75-1181
75-1182

Supreme Court, U. S.
FILED
FEB 19 1976
, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. _____

RICHARD A. BATTERTON, ETC., ET AL., *Petitioners,*
v.
ROBERT FRANCIS, ETC., ET AL., *Respondents.*

RICHARD A. BATTERTON, ETC., ET AL., *Petitioners,*
v.
BARRY BETHEA, ETC., ET AL., *Respondents.*

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner,*
v.
ROBERT FRANCIS, ET AL., *Respondents.*

APPLICATIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' JOINT APPENDIX

GERARD C. SMETANA,
WILLIAM H. DUROSS, III,
BOROVSKY, SMETANA, EHRLICH & KRONENBERG,
2011 Eye Street, N.W.,
Suite 800
Washington, D. C. 20006,
Attorneys for Petitioner in No. _____

FRANCIS B. BURCH,
Attorney General of Maryland,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3718

JOEL J. RABIN,
Assistant Attorney General,

THEODORE LOSIN,
Assistant Attorney General,
1100 North Eutaw Street,
Baltimore, Maryland 21201,
383-3508,
Attorneys for Petitioners in No. _____

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
Opinion of District Court in *Francis v. Davidson* 340 F. Supp 351 (*Francis-I*), filed January 28, 1972	2a
Memorandum and Order of District Court, dated February 23, 1972	47a
Memorandum and Order of District Court, filed March 1, 1972	49a
Transcript of Oral Opinion of District Court, March 1, 1972	50a
Order of District Court, filed March 6, 1972	54a
Memorandum for the United States as Amicus Curiae by the Solicitor General, August, 1972	56a
Order of Affirmance by the Supreme Court 409 U.S. 904, October 16, 1972	61a
Letter Opinion of District Court, December 10, 1973	61a-1
Memorandum Amicus Curiae of the Department of Health, Education, and Welfare, February 19, 1974	61a-2
Opinion of the District Court in *Francis v. Davidson,* 379 F. Supp. 78 (*Francis-II*), of June 25, 1974	79a
Opinion of the District Court in *Bethea v. Mason,* 384 F. Supp. 1274, filed November 27, 1974	86a
Judgment *Bethea v. Mason,* filed December 12, 1974	97a
Order of dismissal by the Supreme Court, *Mason, etc., et al. v. Francis,* 419 U.S. 1042, filed December 9, 1974	99a

	PAGE
Opinion by Court of Appeals F.2d, *Francis v. Mason, Bethea v. Batterton,* decided September 22, 1975	100a
Order of Supreme Court Extending Time to File Petition for Writ of Certiorari, in *Batterton v. Francis,* No. A-468, dated November 20, 1975	104a
Order Extending Time to File Petition for Writ of Certiorari, in *Chamber of Commerce v. Francis,* No. A-508, dated December 4, 1975	105a
Judgment in case No. 74-1991, 74-1992, dated September 22, 1975	106a
Order granting Chamber of Commerce intervention in Civil No. 71-853-K, dated January 31, 1974	106a
Court of Appeals opinion, decided June 20, 1973 affirming denial of Chamber of Commerce's intervention motion in *Francis I.*	107a
Pre-Hearing Memorandum of Chamber of Commerce in Civil No. 71-853-K	114a
Motion for Intervention on Behalf of the Chamber of Commerce	116a
Transcript of Proceedings in *Francis II* dated April 26, 1974 (2 pages)	119a
Notice of Proposed Rule Making, 40 Fed. Reg. 33461, (August 8, 1975)	121a
Amendment to 223.100(a), 38 Fed. Reg. 18549 (July 12, 1973)	124a
Various Relevant Statutory Provisions (portions of Social Security, Food Stamps, Railway Retirement, and National Labor Relations Act)	126a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. _____

RICHARD A. BATTERTON, ETC., ET AL., *Petitioners,*
v.
ROBERT FRANCIS, ETC., ET AL., *Respondents.*

RICHARD A. BATTERTON, ETC., ET AL., *Petitioners,*
v.
BARRY BETHEA, ETC., ET AL., *Respondents.*

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner,*
v.
ROBERT FRANCIS, ET AL., *Respondents.*

APPLICATIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' JOINT APPENDIX

In The United States District Court,
For The District of Maryland

Civil No. 71-853-K.

Robert Francis, individually and on behalf of his minor children, Robert J. Francis, et al.

v.

Rita C. Davidson, Secretary, Department of Employment and Social Services, and Raleigh C. Hobson, Director, Social Services Administration.

Department of Health, Education & Welfare, the U. S. Chamber of Commerce, the Maryland State Chamber of Commerce, and the Chamber of Commerce of Metropolitan Baltimore, Amici Curiae.

January 28, 1972

Frank A. Kaufman, District Judge.

This case involves constitutional and other issues arising in connection with the administration of the AFDC-E program.[1] Plaintiffs are fathers, who, on

[1] AFDC-E (sometimes known as AFDC-UF, the UF standing for unemployed fathers v. the E for employment or employed) is the short, commonly-used reference label for a program established by the Congress in 1961 pursuant to 42 U.S.C. § 607, providing aid for children in a family in which the father is unemployed. Prior to the enactment of that statute, there had been in existence a program known as AFDC pursuant to 42 U.S.C. §§ 601-606 under which aid was made available for children in families in which the father was absent from the home, incapacitated or dead. *See King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). That program was continued in effect after the establishment of the AFDC-E program. Since 1961, the two programs have run side by side. Both depend upon a combination of federal and state funds and are administered by the states under

behalf of themselves and others similarly situated, allege that benefits under that program have been denied to their respective children by the Department of Employment and Social Services of the State of Maryland under Rule 200.X.A. (2) of that Department,[2] in violation of (a) 42 U.S.C. § 607[3] and 45 C.F.R. § 233.100(a),[4] and (b) the Fourteenth Amendment of the Federal Constitution. Defendants, named in their individual and representative capacities, are, respectively, the Secretary of the Maryland Department of Employment and Social Services and the Director of the Maryland Social Services Administration, a division of that Department.[5] HEW has submitted its views with regard to the issues in this case, pursuant to the request of this Court addressed to that agency in accordance with the strong policy suggestion stated by the Supreme Court of the United States in Rosado v. Wyman, 397 U.S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970).[6] The

regulations promulgated by the Department of Health, Education and Welfare (HEW) pursuant to statutory authority delegated to HEW by the Congress.

The history of AFDC is discussed in Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), and in Rosado v. Wyman, 397 U.S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970). All states participate in AFDC. The history of AFDC-E is set forth in Macias v. Finch, 324 F. Supp. 1252 (N.D. Calif. 1970). Twenty-two states and the District of Columbia presently participate in AFDC-E.

[2] See n. 14 *infra*.

[3] See n. 10 *infra*.

[4] See n. 12 *infra*.

[5] During the pendency of this case, Raleigh C. Hobson resigned as the Director of the Social Services Administration and his replacement, Dr. Irene Olson, automatically became a party defendant herein in his place and stead pursuant to Federal Civil Rule 25(d)(i).

[6] Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion, or in cases where there is a real doubt as to how the Department's standards apply to the particular state regulation or program.
Rosado v. Wyman, *supra* at 407-408, 90 S. Ct. at 1215 (footnote omitted).

United States Chamber of Commerce and the Chamber of Commerce of Metropolitan Baltimore were permitted to file amicus briefs and to take part in oral argument.[7]

Robert Francis, one of the two original plaintiffs in this case, became out of work on July 1, 1971 when the union, of which he was a member, called a strike at the plant at which he was working. The other original plaintiff, Franklin Wilkens, was discharged from his employment on June 22, 1971 because of gross misconduct. Wilkens subsequently obtained new employment and withdrew his complaint herein. At the time of Wilkens' withdrawal, Edward Wright was granted leave to become a plaintiff herein.[8] Wright's employer discharged him on May 12, 1971 for alleged gross misconduct (excessive absenteeism). Both Francis and Wright (as well as Wilkens during the period he was out of work) applied for and were denied AFDC-E benefits by the Department of Social Services of the City of Baltimore. Wright is still out of work. Francis went back to work on September 10, 1971 when the strike which had been called by his union ended.

In the 1961 legislation originating the AFDC-E program, the term "dependent child" was defined in 42 U.S.C. § 607(a), Pub. L. No. 87-31, § 407, 75 Stat. 75 (1961), to include "a needy child" under the age of

[7] The United States Chamber of Commerce, which sought leave to intervene herein as a party under Federal Civil Rule 24(b), was given the opportunity, both in written and oral argument, to present its contentions against the background of proffered facts which the national Chamber stated it stood ready to prove if permitted to intervene as a party. In this opinion, this Court assumes, *arguendo* only, the correctness of those proffered facts, and for that reason, without determining whether such intervention would, in the words of Rule 24(b), unduly delay or prejudice the adjudication of the rights of the original parties," concludes that there is no reason to permit the same and accordingly hereby denies the said application to intervene.

[8] The two original plaintiffs, Wilkens and Francis, as well as the plaintiff Wright, were permitted to proceed in forma pauperis after filing affidavits indicating their lack of-funds and property.

eighteen "who has been deprived of parental support or care by reason of the unemployment (*as defined by the State)*" of a parent, and who is living with any of his relatives "in a place of residence maintained by one or more of such relatives as his (or their) own home." (Emphasis added). In 1968, Congress enacted extensive amendments and, *inter alia,* replaced the word "parent" with the word "father," replaced the above italicized parenthetical words with the words "as determined in accordance with standards prescribed by the Secretary," and added 42 U.S.C. § 607(b), providing as follows:

> The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—[9]
>
> (1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—
>
> (A) such child's father has not been employed (*as determined in accordance with standards prescribed by the Secretary)* for at least 30 days prior to the receipt of such aid. [Emphasis added.][10]

[9] 42 U.S.C. § 602 provides that each state shall have the right to submit its own plan for the administration of its AFDC-E program, provided same meets the standards of the statute. Congress is not required to provide funds to a state without such a program. King v. Smith, *supra;* Carroll v. Finch, 326 F. Supp. 891 (D. Alaska 1971); Woolfolk v. Brown, 325 F. Supp. 1162, 1170-1171 (E.D. Va. 1971); Cooper v. Laupheimer, 316 F. Supp. 264, 268 (E.D. Pa. 1970). Nor is a state required to have an AFDC-E program. Henry v. Betit, 323 F. Supp. 418 (D. Alaska 1971).

All references in this opinion to the "Secretary" are to the Secretary of HEW, except to the extent that there is specific reference to the Secretary of the Department of Employment and Social Services of the State of Maryland.

[10] 42 U.S.C. § 607, in its entirety, as amended in 1968 and as presently in force and effect, is set forth in Appendix A. In addition to the amendments enacted by the Congress in 1968, certain other amendments, not material herein, have been made to 42 U.S.C. § 607 since the inception of the AFDC-E program.

After the 1968 statutory amendments by the Congress, the Secretary of HEW promulgated, as 45 C.F.R. § 233.100(a), a regulation, providing, *inter alia,* that "[i]f a State wishes to provide AFDC for children of unemployed fathers, the State plan * * * must, except as specified in paragraph (b) of this section[11] * * * [i]nclude a definition of an unemployed father * * * [and] shall include any father who is employed less than 30 hours a week, * * *"[12]

[11] The exceptions set forth in (b) are not material herein.

[12] Effective October 1, 1971, the Secretary amended the regulation to substitute "100 hours a month" for "30 hours a week." 36 Fed. Reg. July 21, 1971.

That regulation also requires that any such plan shall provide for payments only if the "father has been unemployed for at least 30 days prior to the receipt of such aid" and only if the "father has not without good cause, within such 30-day period prior to the receipt of such aid, refused a bona fide offer of employment or training for employment" and only if the "father (a) has six or more quarters of work * * * [The regulation states that "[a] 'quarter of work' with respect to any individual means a period * * * in which he received earned income of not less than $50 * * *."], within any 13-calendar-quarter period ending within 1 year prior to the application for such aid, or (b) within such 1-year period, received unemployment compensation under an unemployment compensation law of a State or of the United States, or was qualified * * * for such compensation under the State's unemployment compensation law." The regulation further provides that "[a]n individual shall be deemed 'qualified' for unemployment compensation under the State's unemployment compensation law if he would have been eligible to receive such benefits upon filing application, or he performed work not covered by such law which, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such benefits upon filing application." The regulation specifically calls for "the denial of * * * aid * * * [i]f, and for as long as, such child's father is not currently registered with the public employment offices in the State, and [w]ith respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States."

45 C.F.R. § 233.100(a), 34 Fed. Reg. 1146 (1969), as continuously in force and effect since 1969, is set forth in Appendix B.

Section 6 of Maryland's Unemployment Insurance Law, Md. Ann. Code art. 95A, § 6 (1969 Repl. Vol.), sets forth certain disqualifications for benefits and provides, *inter alia,* that an individual shall be disqualified for benefits when he is discharged for "gross misconduct" (section 6(b)), and when the Executive Director finds that "his *unemployment* is due to a *stoppage of work,* other than a lockout, which exists because of a labor dispute * * * [emphasis added]."[13]

Rule 200.X.A. of the Social Services Administration, Department of Employment and Social Services, of the State of Maryland, denies AFDC-E aid if the father is "disqualified for unemployment insurance."[14]

[1, 2] Plaintiffs, on behalf of themselves and others similarly situated, seek injunctive and declaratory relief as well as damages in the form of the payment of AFDC-E benefits withheld by the State of Maryland pursuant to Rule 200.X.A.[15] Because injunctive relief is sought, *inter alia,* restraining state officials "from the enforcement, operation and execution of a statewide regulation on the ground of its unconstitutionality," King v. Smith, 392 U.S. 309 n. 3, 88 S. Ct. 2128, 2130, n. 3, 20 L. Ed. 2d 1118 (1969), and because those allegations of unconstitutionality are not so frivolous or so obviously lacking in merit as not to require the convening of a three-judge court, *see* Md. Citizens for Representative General Assembly v. Governor of Maryland, 429 F.2d 606, 611 (4th Cir. 1970), this three-judge court was convened pursuant to 28 U.S.C. § 2281.

[13] Md. Ann. Code art. 95A, § 6 is set forth in Appendix C.

[14] Rule 200.X.A. provides, in part, as follows:
A grant may not be paid from GPA or AFDC-E:
* * * * * *
2. To meet need due to being disqualified for unemployment insurance.

[15] While exhaustion is not required in actions brought under 42 U.S.C. § 1983, and 28 U.S.C. § 1343, "where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court," King v. Smith, *supra* at 312 n. 4, 88 S. Ct. at 2131 n. 4, plaintiffs herein have in fact exhausted their state administrative remedies.

I.

Plaintiffs assert jurisdiction in this case pursuant to 28 U.S.C. § 1343(3)[16] and (4),[17] which are jurisdictional counterparts of 42 U.S.C. § 1983,[18] the violation of which is alleged by plaintiffs. In a concurring opinion in Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939), Mr. Justice Stone wrote (at 531, 59 S. Ct. at 971) that section 1343(3) applied "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights." In Weddle v. Director, Patuxent Institution, 436 F.2d 342, 343 (4th Cir. 1970), Judge Winter, noting his acceptance of Judge Friendly's analysis in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1960), held that "[w]here, as here, the infringement is one solely of property rights, § 1331 is the applicable jurisdictional statute, and jurisdiction may be sustained only upon

[16] 28 U.S.C. § 1343(3) and (4) provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

[17] See n. 20 *infra*.

[18] 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

satisfaction of the amount in controversy requirement [footnote omitted]."[18a] *See also* Garren v. City of Winston-Salem, North Carolina, 439 F.2d 140 (4th Cir. 1970).

In King v. Smith, *supra*, the Supreme Court declared invalid as inconsistent with certain provisions of the Social Security Act, Alabama's "substitute father" regulation, pursuant to which Alabama denied AFDC aid to the children of a mother who "cohabits" in or outside her home with any single or married able-bodied man. In *King*, after noting the constitutional equal protection attack which had been held meritorious by the three-judge district court below, a view which Mr. Justice Douglas, concurring specially (392 U.S. at 334-336, 88 S. Ct. 2128), would have adopted in place of what he characterized (at 334, 88 S. Ct. 2128) as "the statutory route" followed by the majority of the Court, Mr. Chief Justice Warren, for the majority, wrote (at 313 n. 3, 88 S. Ct. at 2131):

> We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts.

In Eisen v. Eastman, *supra*, 421 F.2d at 564, Judge Friendly suggested that "it is quite arguable that *King* came within Justice Stone's formulation on the basis that Alabama's 'substitute father' regulation not merely caused economic loss to Mrs. Smith's children, but also infringed their 'liberty' to grow up with financial aid for their subsistence and her 'liberty' to have Mr. Williams visit her on weekends."

In Rosado v. Wyman, 397 U.S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970), in which a New York statute was held to have defined a standard of need for AFDC payments in violation of the federal statutory standard, Mr. Justice Harlan (at 405 n. 7, 90 S. Ct. at 1214) did not

[18a] In *Weddle*, an inmate in an institution alleged custodial officers had taken several items of his personal property.

reach the issue posed by Mr. Justice Stone's formula in *Hague*, stating:

> Since we conclude that the District Court properly exercised its pendent jurisdiction, we have no occasion to consider whether, as urged by petitioners, this statutory claim satisfies the $10,000 amount-in-controversy requirement of the general federal jurisdiction provision, 28 U.S.C. § 1331, or whether it could be maintained under 28 U.S.C. § 1343(3), which contains no amount-in-controversy limitation, as an action "[t]o redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens. . . ." See King v. Smith, 392 U.S., at 312 n. 3, [88 S. Ct. 2128, 20 L. Ed. 2d 1118] see generally Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

On the same day as *Rosado* was decided, the Supreme Court in Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), held valid and non-violative of equal protection principles Maryland's placing of a dollar limit per month upon AFDC grants without regard to need or to size of family. In so doing, while the Supreme Court reversed the three-judge district court's contrary determination on the merits, it took no issue with the district court's holding that "[j]urisdiction is properly invoked under Civil Rights Act, 28 U.S.C.A. § 1343(3) and (4), and 42 U.S.C.A. § 1983 * * *." Williams v. Dandridge, 297 F. Supp. 450, 453 (D. Md. 1968). Earlier in Lewis v. Martin, 397 U.S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561 (1970), the Supreme Court held a California welfare regulation invalid upon statutory grounds without indicating any doubts as to the existence of jurisdiction. And still earlier, in a per curiam opinion in Shapiro v. Solman, 396 U.S. 5, 90 S. Ct. 25, 24 L. Ed. 2d 5 (1969), the Supreme Court affirmed a three-judge district court opinion, 300 F. Supp. 409 (D. Conn., 1969), in which a Connecticut welfare practice was invalidated upon statutory grounds and in which section 1343(3) jurisdiction was held to exist. Most recently, in Townsend v. Swank, 404 U.S. 282, 92 S. Ct.

502, 30 L. Ed. 2d 448 (1971), reversing the judgment below for defendants in Alexander v. Swank, 314 F. Supp. 1082 (D. Ill. 1971), the Supreme Court, in considering a challenge under 42 U.S.C. § 1983 to Illinois' AFDC program on the grounds that the latter was inconsistent with federal law and this void under the Supremacy Clause, and was also violative of equal protection principles, raised no question concerning the assumption of jurisdiction by the court below and reversed on the ground that the Illinois statute and regulation conflicted with federal law and were invalid under the Supremacy Clause. Mr. Justice Brennan wrote that the Court therefore did not reach the equal protection issue (92 S. Ct. at p. 508). However, he did note (at p. 508 of 92 S. Ct.) that "we think there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause." Concurring, Mr. Chief Justice Burger stressed that in his opinion the "appropriate inquiry in any case should be simply whether the State has indeed adhered to the provisions [of the federal statute] and is accordingly entitled to utilize federal funds in support of its program. Cf. Rosado v. Wyman, 397 U.S. 397, 420 [90 S. Ct. 1207, 25 L. Ed. 2d 442] (1970)." (at p. 508 of 92 S. Ct.).

In Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971), Judge Anderson, in a case involving discharge of a probationary employee of Connecticut's Department of Welfare, wrote (at 1399): "It is apparent, however, as *Eisen* recognized, that some classes of cases are not readily characterized as involving either rights of personal liberty or property rights but take on characteristics of both. Cases challenging the procedures used in a discharge from public employment are such a class." In *Tichon*, the Second Circuit held (at 1402) that "in the absence of a clear, immediate and substantial impact on the employee's reputation which effectively destroys his ability to engage in his occupation,[19] it cannot be said that a right of personal liberty is

[19] The existence of such facts does seem to tip the scales towards the personal liberty side of the equation and to cause § 1343 (3) jurisdiction to be present. Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

involved" (footnote omitted), and also commented (at 1400) that "unlike welfare recipients, who exist at a bare subsistence level, it cannot be said that an employee's rights to the profits from his job entail 'some sort of right to exist in society.' Johnson v. Harder, 438 F.2d 7 (2 Cir. 1971)."

Johnson v. Harder, *supra,* involved a challenge to Connecticut's action in reducing AFDC payments to a mother with ten children by the amount of Old Age, Survivors and Disability Insurance benefits payable to two of the children because of the death of their father. Writing (438 F.2d at 12) that "[s]ince welfare cases by their very nature involve people at a bare subsistence level, disputes over the correct amounts payable are treated not merely as involving property rights, but some sort of right to exist in society, a personal right under the Stone formula" (footnote omitted), and distinguished McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969), in which a Connecticut welfare regulation was challenged on appeal only upon statutory grounds and in which section 1343 jurisdiction was held lacking, Judge Smith, for himself and Chief Judge Lumbard and Judge Anderson, held (438 F.2d at 12) that "so long as a colorable constitutional claim has been raised, jurisdiction will properly lie." Holding the constitutional claim before it not to be insubstantial, the Court in Johnson v. Harder, *supra,* filed after the Supreme Court's opinion in Dandridge v. Williams, *supra,* held the constitutional (equal protection and due process) claims before it not "to be insubstantial in the light of the recent Supreme Court AFDC cases" (438 F.2d at 13).

Just a few days ago, in Russo v. Kirby, 453 F.2d 458 (2d Cir. 1971), Judge Hays, writing for himself and Judges Moore and Mulligan, in a class action case in which the district court had granted a preliminary injunction on the ground that the New York Social Services Law's provision prohibiting the granting of welfare benefits to strikers infringed federal rights of the plaintiff-claimants, reversed the judgment of the district court below holding that no individual claim of any one plaintiff exceeded $10,000, that aggregation of claims was impermissible under Snyder v. Harris, 394

U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969), that "no colorable constitutional claim is presented," citing Dandridge v. Williams, *supra,* as dispositive of the equal protection contention, and that accordingly no federal jurisdiction existed under 28 U.S.C. § 1343 or under 28 U.S.C. § 1337.[19a]

Less than two years earlier, Judge Hays, concurring specially in a three-judge district court case, in McClellan v. Shapiro, 315 F. Supp. 484, 494 (D. Conn. 1970), expressed similar views in stating his disagreement with the majority's assumption of jurisdiction in a suit challenging the validity of Connecticut's definition of a "dependent child" in its AFDC program. Judge Blumenfeld, for the majority, held the Connecticut statute to be valid, after first determining at the threshold, in disagreement with Judge Hays, that jurisdiction was present under the authority of Judge Friendly's suggested reading of King v. Smith, *supra,* in Eisen v. Eastman, *supra.*

In Roberge v. Philbrook, 313 F. Supp. 608 (D. Vt. 1970), Judge Leddy, after reviewing in depth, *inter alia,* Rosado v. Wyman, King v. Smith, Eisen v. Eastman, as well as numerous other federal court opinions rendered in jurisdictions outside the Second Circuit, held section 1343(3) jurisdiction to be present in a welfare case. In Henry v. Betit, 323 F. Supp. 418 (D. Alaska 1971), the Court, after referring to King v. Smith, Dandridge v. Williams, Eisen v. Eastman, McCall v. Shapiro, and McClellan v. Shapiro, also concluded that it had jurisdiction. In addition, *see* Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), in which the Fourth Circuit, in a post-*Weddle* opinion written by Judge Winter, assumed jurisdiction under 1343(3) in a 1983 case in which the right to inhabit a federally assisted housing project was involved; and Wheeler v. Adams Company, 322 F. Supp. 645, 655 (D. Md. 1971), in which such jurisdiction was similarly assumed in connection with a procedural due process attack upon certain replevin procedures.

[19a] See n. 20 *infra.*

[3, 4] While it is the understatement of the new year 1972 to say that the matter is not free of doubt, this Court, in the absence of any clear guidance from the Supreme Court or from the Fourth Circuit, adopts the approach followed in Johnson v. Harder, *supra,* and holds that the alleged deprivation of AFDC-E benefits in this case constitutes an allegation of infringement of personal liberties and that the constitutional equal protection contentions advanced by plaintiffs herein, while rejected, are not frivolous. "[W]hether the complaint states a cause of action on which relief could be granted * * * must be decided after and not before the court has assumed jurisdiction over the controversy," Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939. (1946). Once having assumed jurisdiction because of the constitutional challenge, this Court believes that whether or not jurisdiction would otherwise exist, it should continue to assert its jurisdiction and proceed to resolve the issues herein involving federal statutes and federal regulations. The views stated by Mr. Justice Harlan in Rosado v. Wyman, *supra,* 397 U.S. at 402-403 and 422-423, 90 S. Ct. 1207, 25 L. Ed. 2d 442, and by Mr. Chief Justice Warren in King v. Smith, *supra,* would appear so to teach.[20]

[20] This Court thus finds it unnecessary to determine if jurisdiction also exists in this case under 28 U.S.C. § 1343(4), or whether the *Hague-Eisen-Weddle* distinction applies in connection with § 1343(4) as well as § 1343(3). For opinions in which those two subsections have been, on the one hand, seemingly considered as one, and, on the other hand, as constituting separate jurisdictional bases, *see, e. g.,* Dale v. Hahn, 440 F.2d 633, 641 (2d Cir. 1971); Eisen v. Eastman, 421 F.2d at 562 n. 2; McCall v. Shapiro, *supra;* Roberge v. Philbrook, 313 F. Supp. at 614-615 n. 7. Nor does this Court reach the question of whether jurisdiction is present herein under 28 U.S.C. § 1337 which provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

In Russo v. Kirby, *supra,* Judge Hays held jurisdiction under § 1337 did not attach because the case did not arise "directly" under federal law. *Cf.* Barlow v. Marriott Corporation, 328 F. Supp. 624 (D. Md. 1971). The possibility that § 1337 jurisdiction exists in this case has not been raised by counsel. Nor has this Court found any cases other than *Russo* in which plaintiffs have challenged a state welfare statute or regulation as violative of welfare rights allegedly created by federal statutes or regulations and in which jurisdiction has been suggested under § 1337.

II.

[5, 6] Originally, in their complaint, plaintiffs asked this Court to permit this proceeding to take place as a class action under Federal Civil Rule 23(a) and (b) (2). During oral argument, counsel for plaintiffs stated agreement with a position suggested by this Court, namely, that if this Court should determine that it has no power to award damages in this case, there would be no need to form a class herein. Nevertheless, there may be reason to form the class herein, in order to avoid the possibility of mootness in view of the fact that the plaintiff Francis has returned to work (see p. 355 *supra*). *See* Doremus v. Board of Education, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952); and Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968). *See also* SEC v. Medical Committee for Human Rights, 404 U.S. ____, 92 S. Ct. 577, 30 L. Ed. 2d 560 (1972); Barrows v. Jackson, 346 U.S. 249, 257 n. 3, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953); Smith v. Board of Education, 365 F.2d 770, 776 (8th Cir. 1966). While this Court recognizes that the continuing importance of the resolution of the issue relating to involvement in labor disputes might cause the nonapplication of any principles of mootness, *see* ITT Lamp Division v. Minter, 435 F.2d 989, 991 (1st Cir.), cert. denied, 402 U.S. 933, 91 S. Ct. 1526, 28 L. Ed. 2d 868 (1971), reh. denied, 404 U.S. 874, 92 S. Ct. 27, 30 L. Ed. 2d 120; Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968), this Court, because this action does fall rather precisely within the language of Federal Civil Rule 23(b) (2), hereby determines that this action shall be maintained as a class action on behalf of two separate subclasses, namely, (1) those who have applied unsuccessfully for AFDC-E benefits and have been involved in a labor dispute and (2) those who have also

so applied and have been so denied because they have been discharged by their respective previous employers for misconduct. In so determining, this Court finds that each of the said two classes is so numerous that joinder of all members is impractical; there are questions of law and fact common to the members of each of the said two classes; the claims of the respective parties herein are typical of the claims of all members of the class to which those representatives respectively belong; the representative parties will fairly and adequately protect the interests of the class; and counsel for the named plaintiffs have most diligently and competently represented the interests of the members of the two subclasses. Because the classes are designated pursuant to Rule 23(b) (2), no notice is required by Rule 23(c) (2). While, in some instances, notice to each member of the class may be required in order to avoid violation of due process principles, in this case, this Court, under the circumstances, holds that notice need not be given to each member of the two classes. If any retroactive payments are required (see the discussion at p. 371, *infra*), this Court has confidence that the federal and Maryland authorities will take appropriate steps to inform all persons entitled to such benefits of their rights thereto. For a discussion of notice requirements in class suits pursuant to Federal Rule 23, *see,* on the one hand, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), as contrasted with Eisen v. Carlisle and Jacquelin, 391 F.2d 555 (2d Cir. 1968). *See also* 3B J. Moore, Federal Practice, ¶ 2355 at 1152-53 (2d ed. 1969), favoring the views expressed in the first two cases that notice in a Rule 23(b) (2) case is not always required.

[7, 8] In Dandridge v. Williams, *supra*, 397 U.S. at 478, 90 S. Ct. at 1158, 25 L. Ed. 2d 491, Mr. Justice Stewart wrote:

> * * * In King v. Smith, supra, we stressed the State's "undisputed power," under these provisions of the Social Security Act, "to set the level of benefits and the standard of need." Id. at 334. [20 L. Ed. 2d at 1135] * * * We described the AFDC enterprise as "a scheme of cooperative federalism", id. at 316 [20 L. Ed. 2d at 1125] * * *, and noted carefully that "[t]here is no question that states have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." Id. at 318-319 [20 L. Ed. 2d at 1126] * * *.

Those comments would seem to apply with equal force to the AFDC-E program. In *Dandridge,* Mr. Justice Stewart, speaking for a unanimous Court and holding that Maryland's administrative practice which imposed an upper limit on the total amount of money any one family unit might receive under the AFDC program, did not violate the Equal Protection Clause and was not in conflict with any provision of the Social Security Act, also wrote:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." * * * [at 485, 90 S. Ct. at 1161]
>
> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. Goldberg v. Kelly, 397 U.S. 254 [90 S. Ct. 1011, 25 L.

Ed. 2d 287] [1970]. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. [citations omitted] [at 487, 90 S. Ct. at 1162].

See also Richardson v. Belcher, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (November 22, 1971).

In this case, plaintiffs urge that Maryland's Rule 200.X.A.(2) discriminates without rational basis against certain children whose fathers happen to be out of work because of their own misconduct which justified their discharge by their employer, or because of a labor dispute. Plaintiffs stress the need to focus upon the welfare of each child and to disregard other factors such as whether the overall public policy of a state is furthered by denying AFDC-E benefits to children of such fathers. The State of Maryland, relying largely upon Dandridge v. Williams, *supra*, contends that Maryland, through the power granted to it to enact certain standards, on a cooperative basis with the Federal Government, possesses the right to make policy determinations of the type underlying the two applications of Maryland Rule 200.X.A.(2) which are challenged herein, and that it is not up to the courts to question the wisdom of the State of Maryland in so doing. The United States Chamber of Commerce and the state and local Chambers of Commerce, as amici herein, urge this Court to hold the Maryland Rule, denying AFDC-E benefits to children of fathers out of work because of involvement in labor disputes, valid because a contrary rule would be in conflict, under the Supremacy Clause of the Constitution, Article VI, with federal statutes enacted by the Congress in the field of labor relations.[21] The United States Chamber of Commerce unsuccessfully took that same position in

[21] The three Chambers of Commerce take no position with regard to the validity of the Maryland Rule insofar as it denies benefits to children of fathers who are disqualified from receiving Maryland unemployment compensation benefits for reasons other than those relating to stoppage of work because of labor disputes.

ITT Lamp Division v. Minter, 435 F.2d 989 (1st Cir.), cert. denied, 402 U.S. 933, 91 S. Ct. 1526, 28 L. Ed. 2d 868 (1971), pet. for reh. denied 404 U.S. 874, 92 S. Ct. 27, 30 L. Ed. 2d 120, in which the Massachusetts AFDC-E program, which *permits* aid to fathers out of work because of involvement in labor disputes, was held not in conflict with any federal statutes. HEW, in its presentation to this Court, contends that a state is constitutionally permitted to follow both of the two Maryland practices under attack in this case, or practices contrary and opposite thereto. This Court believes that the HEW position is sound.

Dealing first with the constitutional challenge relating to labor disputes, this Court is of the opinion that rational bases exist for Maryland's position denying AFDC-E benefits to children of fathers who are out of work because of labor disputes, just as there are rational reasons for the opposite view which has been adopted by most of the states.[22] Thus, the equal

[22] The State of Maryland, in a memorandum filed in this case, has set forth the following "separate, although somewhat related, bases upon which the Rule may be justified:"

1. To harmonize the State's unemployment compensation program and its AFCD-E program, both such programs being employment programs and both being cut from the same fabric of cooperative federalism woven by the Social Security Act.
2. To discourage voluntary unemployment and thereby to promote employment in the State.
3. In the case of economic strikers, to maintain the largest measure of neutrality in collective bargaining and strikes, so as not to incur the risk of adversely affecting employment in, and the economy of, the State.

HEW has informed this Court that, in addition to Maryland, 22 states currently have AFDC-E programs and that of those 22, one denies benefits to those in need as a result of involvement in labor disputes, two so deny benefits unless the involvement is due to a lockout, two so deny benefits unless the strike in question is "legal," and one is new to the program and HEW has no knowledge as yet concerning that state's plan in this connection. HEW has further written to this Court that "[a]s far as it knows,

protection challenge to Maryland's denial of benefits to such fathers must be rejected.

Nor has the Congress, by the enactment of labor laws having national scope, in any way, by the terms of those statutes or otherwise, indicated that those laws or the policies underlying them are intended to control the resolution of those opposing viewpoints of social welfare which underlie the differences between the Maryland and the contrary rules relating to the grant or denial of AFDC-E benefits to those out of work because of involvement in labor disputes. In *Minter,* 435 F.2d at 992-993, Judge Coffin has written:

> * * * Where Congress has not clearly manifested its purpose to exclude state action which takes the form of exercise of its historic police powers, such state action will not be invalidated under the Supremacy Clause, "in the absence of persuasive reasons", Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 [83 S. Ct. 1210, 10 L. Ed. 2d 248] (1963), or unless the administration of the state law "palpably infringes" upon the federal policy. Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 766 [65 S. Ct. 1515, 89 L. Ed. 1915] (1945). *See also* Head v. New Mexico Bd. of Examiners, 374 U.S. 424 [83 S. Ct. 1759, 10 L. Ed. 2d 983] (1963); Buck v. California, 343 U.S. 99 [72 S. Ct. 502, 96 L. Ed. 775] (1952). [Footnote omitted.]

Judge Coffin's statement, written in the context of labor disputes, would seem equally applicable with regard to the attack under the Supremacy Clause upon

Maryland is the only state" which "conditions eligibility for AFDC-UF [see n. 1 *supra*] on eligibility for unemployment compensation," but that the questionnaire HEW has addressed to the states "did not specifically address itself to such restrictions, and there is, therefore, at least a possibility that similar provisions exist in other state AFDC-UF plans." The State of Maryland has furnished information to this Court which may indicate that at least one other state may not permit strikers to register for the retaining and/or reemployment which is a condition precedent to the grant of AFDC-E benefits.

Maryland's denial of aid to children of fathers discharged from their last employment because of misconduct. And the reasons which require rejection of the equal protection challenge upon denial of aid in connection with labor disputes also dispose of that challenge with regard to loss of work because of gross misconduct. Accordingly, the constitutional challenge stated by plaintiffs is rejected, *in toto.*[23]

IV.

Plaintiffs also contend that the Maryland Rule is in conflict with the federal statute and the HEW regula-

[23] Having so disposed of the consitutional attack, this three-judge court could dissolve itself and return the question of the determination of the alleged conflict between the Maryland Rule and the federal statute and regulation, to the single district judge to whom this case was originally assigned. However, in accordance with the discretion of a three-judge court (which is properly convened to consider a nonfrivolous constitutional challenge) to retain jurisdiction with regard to the non-constitutional issues, this three-judge court, in view of the importance of the issues set forth herein, has determined not to dissolve itself and to reach, as a three-judge court, the nonconstitutional issues presented herein. In Rosado v. Wyman, 397 U.S. *supra* at 403, 90 S. Ct. at 1213, Mr. Justice Harlan, approving the dissolution of a three-judge district court where a constitutional claim had been declared moot, wrote:

> * * * Even had the constitutional claim not been declared moot, the most appropriate course may well have been to remand to the single district judge for findings and the determination of the statutory claim rather than encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court.

However, since the holding herein probably renders any further proceedings (see the discussion at p. 371 *infra)* unnecessary and since all three of the members of this three-judge court have participated in the formulation of this opinion, this Court has determined not to dissolve itself and not to remand this case to the single judge to whom the complaint was originally presented. *See also* Woolfolk v. Brown, 325 F. Supp. 1162, 1163 (E.D. Va. 1971); C. Wright, Law of Federal Courts § 50, pp. 190-91 (2d ed. 1970).

tion promulgated thereunder. Analyses of the provisions of 45 C.F.R. § 233.100, on the one hand, and section 6 of the Maryland Unemployment Insurance law, on the other hand, show that all of the Maryland disqualifications are also disqualifications under the federal regulation, other than pregnancy which does not apply to fathers, participation in labor disputes, gross misconduct, discharge or suspension as a disciplinary measure, and voluntarily leaving prior employment.[24] The specific issue which accordingly is presented herein is whether gross misconduct and discharge or suspension as a disciplinary measure, or disqualification because of involvement in a labor dispute, can be made disqualifications in a state's AFDC-E program, without that state violating federal statutory and/or regulatory requirements.

[9-12] It is conceded in this case by respondents that each of the plaintiffs not only qualifies as needy, but also took all steps in accordance with 45 C.F.R. § 233.100, including both application for employment and readiness to take part in retraining, preliminarily necessary to place himself in position to obtain AFDC-E benefits, and that he would have received such benefits had he not, in the case of the plaintiff Wright, been discharged for alleged misconduct, and, in the case of the plaintiff Francis, been out of work because of the strike called by his union. As discussed *infra,* 45 C.F.R. § 233.100(a) provides that "if a State wishes to provide AFDC for children of unemployed fathers the State Plan * * * *must* * * * [*i*]*nclude* a definition of an

[24] HEW, in its memorandum filed in this case, argues that the Maryland Rule 200.X.A. (2), by denying AFDC-E benefits to those disqualified under Maryland's Unemployment Compensation law, "avoids the anomaly of denying" those benefits to those "who receive unemployment insurance benefits while providing" them "to individuals who are disqualified for unemployment insurance benefits because of their own acts." But the answer is that there can reasonably be differences of opinion as to whether such an anomaly exists; further, in any event, Maryland, by neither statute nor rule, can exclude from the beneficiary class under Maryland's AFDC-E program those whom the Congress or the Secretary of HEW have required to be included.

unemployed father * * * which shall include any father" who is employed less than a given number of hours and which may include any father who is employed for a certain number of other hours. Thus, HEW used mandatory language, i.e., that the state plan *must* include any father who is employed less than a given number of hours. There is nothing in the regulation which permits a state plan to deny benefits under the state's AFDC-E program, on the ground that the father of the needy child is unemployed because his discharge from employment was due to his own misconduct. Such a father is clearly not employed. Consequently, Maryland Rule 200X.A. (2), insofar as it attempts to transplant, within the framework of Maryland's AFDC-E program, the disqualification requirements of sections 6(b) and/or (c) of the Maryland Unemployment Compensation law, is violative of HEW's regulation. The fact that HEW has itself, by approving the Maryland plan, given approval to such violation in no way deprives the plaintiff Wright, and others similarly situated, from requiring that the Maryland AFDC-E program be administered in accordance with the HEW regulation. Respondents and HEW urge upon this Court that HEW's approval of the Maryland Rule in question is presumptively valid since (1) the Congress delegated broad rule-making powers to HEW in connection with administering the program, (2) HEW, in promulgating its regulation, left great leeway for each state to determine many details in its own plan,[25] and (3) HEW approved the Maryland Rule. It is true that such approval is entitled to considerable weight by this Court, *see* Rosado v. Wyman, *supra,* 397 U.S. at 406, 90 S. Ct. 1207, 25 L. Ed. 2d 442; King v. Smith, *supra,* 392 U.S. at 334, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (Douglas, J., concurring); Udall v. Tallman, 380 U.S. 1, 4, 16 and ff., 85 S. Ct. 792, 13 L. Ed. 2d 616

[25] A reading of the text of 45 C.F.R. § 233.100(c) clearly demonstrates that leeway. See Appendix B. The legislative history of 42 U.S.C. § 607 indicates neither the presence nor absence of any congressional intent in connection with disqualification for AFDC-E benefits because of discharge for misconduct.

(1965); Jno. McCall Coal Company, Inc. v. United States, 374 F.2d 689, 692 (4 Cir. 1967), particularly when the Congress has delegated policy-making to the agency. Davis, Administrative Law § 5.05. But, once an administrative agency has promulgated a regulation, even in instances where it is not required to do so, that administrative agency is bound to follow its regulation. United States v. Heffner, 420 F.2d 809 (4th Cir. 1970); United States ex rel. Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). *Cf.* Townsend v. Swank, *supra.* That is particularly true where the regulation uses unambiguous, mandatory language. A man out of work because he was discharged for cause by his employer *is unemployed.* There can be no two ways about that conclusion. Accordingly, this Court holds that the disqualification in Maryland's Rule 200.X.A. (2) of fathers who were discharged because of gross misconduct or as a disciplinary measure, is in conflict with 45 C.F.R. § 233.100(a) and that the said Maryland Rule is invalid insofar as that disqualification is concerned.

The wording of 45 C.F.R. § 233.100(a) also requires a similar holding with regard to Maryland's denial of AFDC-E benefits to those out of work because of labor disputes. While the legislative history of 42 U.S.C. § 607 throws little light on the subject,[26] it is contended that the provisions of the statute,[27] which indicate the emphasis Congress placed upon retraining, preclude the payment of AFDC-E benefits to strikers. However, persons out of work because of a labor dispute certainly have been known to find new jobs during the period of the labor dispute and thereafter not to return to the old job. And, in the case at bar, it is stipulated that the plaintiff Francis did apply for a new job and did agree to take part in the required training.[28]

[26] See Appendix D.

[27] See Appendix A.

[28] Nor does the usage of the word "employed" or similar words in other contexts compel any one meaning of the word "unemployment" as used in 42 U.S.C. § 607 or the word "employed" as used in 45 C.F.R. § 233.100(a). The Federal Bureau of Labor Statistics classifies persons out of work because of involvement in labor disputes as "employed persons" rather than "unemployed persons." However, it must be noted that the Bureau classifies some persons who might well be thought by the average person to be unemployed, as neither "employed" nor "unemployed," but rather in the "not in the labor force grouping." An example is persons who are "voluntarily idle." *See* Handbook of Labor Statistics (1970), U. S. Dept. of Labor, Bureau of Labor Statistics Technical Notes, Current Population Survey, pp. 1 & 2. Thus, the Bureau's classifications are not too helpful in the context of this case where it is necessary to decide if claimants for AFDC-E benefits are either employed or unemployed. Under the National Labor Relations Act, a striker continues to have rights to his job and to his employee status. 29 U.S.C. § 152(3). *See also* NLRB v. Mackay Radio & Teleg. Co., 304 U.S. 333, 345, 58 S. Ct. 904, 82 L. Ed. 1381 (1938); Mooresville Cotton Mills v. NLRB, 97 F.2d 959, 961 (4th Cir. 1938). Turning to section 6(e) of the Maryland Unemployment Insurance law, it is noted that the section specifically refers to "unemployment * * * due to a stoppage of work." Thus, the State of Maryland, under that law, classifies those involved in labor disputes as unemployed; however, it then disqualifies such persons from collecting unemployment compensation.

[13-15] In King v. Smith, *supra,* the Supreme Court analyzed the purposes of the AFDC program and concluded that the Alabama regulation, which, the State of Alabama contended, was intended to discourage immorality and illegitimacy and also to avoid unfairly penalizing families where an official marital relationship existed, was inconsistent with the statute on the ground that Congress intended to include in the category of the word "parent" a person who had a legal obligation to support the child in question. With regard to the immorality point, the Supreme Court, 392 U.S. at 324-325, 88 S. Ct. at 2137, stated that federal public welfare policy "now rests on a basis considerably more sophisticated and enlightened than the 'worthy person' concept of earlier times. * * * In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures. . . ." Thus, the Supreme Court, in King v. Smith, found that the justifications which the State of Alabama offered were

incompatible with the federal congressional purpose. In this case, the State of Maryland, and the Chambers of Commerce, particularly the national Chamber of Commerce, strenuously urge this Court to hold that the Congress has clearly indicated, through its labor legislation, and in other ways that it did not intend to lend governmental support to those out of work because of labor disputes and that therefore the word "unemployment," as used in the statute and defined in the regulation by HEW, should be read to exclude such persons. The difficulty with that approach is that it is a boot strap one because there is little or nothing in the legislative history, or in the words of the statute itself, or in the words of the regulation, or indeed in the advice received by this Court from HEW, to indicate whether the word "unemployment," as used in the statute and amplified in the regulation, was or was not intended to include such persons. Perhaps it is in recognition of that fact that HEW would have us go both ways and say that the Congress empowered HEW to leave to each participating state — and that HEW in turn by its regulation has left to each state — the determination of whether the word "unemployment," in the context of a state's own AFDC-E program, includes or excludes such persons. In support of that view, it is to be noted that when Congress removed the parenthetical words "as defined by the State," and substituted the words "as determined in accordance with standards prescribed by the Secretary," Congress did not simply substitute the words "as determined by the Secretary." Thus, Congress used words which did not mandatorily require the Secretary to require each state to adopt the same meaning of the word "employment" but instead merely *authorized* the Secretary to prescribe a national meaning if the Secretary so desired. In so doing, this Court agrees that the Congress empowered the Secretary, by regulation, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those out of work because of involvement in labor disputes, or (3) to leave that decision to each state. A quick look at 45 C.F.R. § 233.100(a) (1) (ii) reveals a specific instance in which each state is given the power

of definition by the Secretary.[28a] Thus, the Secretary demonstrated that he knew exactly how to state clearly when he desired to leave a matter to the discretion of each state. By contrast, the language of 45 C.F.R. § 233.100(a) (1) (i) is crystal clear, i.e., "* * * the State Plan * * * *must* * * * *include a definition* of an employed father * * *, which *shall* include a father who is *employed less than* 30 hours a week [amended effective October 1, 1971 to be "100 hours per month"] *or less* than three quarters of a number of hours considered by the industry to be full time for the job, whichever is less * * *." (Emphasis added). The presence of those words renders the Secretary's regulation incapable of being construed in more than one of the three ways left open to the Secretary by the Congress. A father who is not working at all because of his involvement in a labor dispute is a father who "is employed less than 30 hours a week" and less than three quarters of his industry's average. Whether the word "unemployment" covers or does not cover persons out of work because of labor disputes, the Secretary, acting under the authority delegated to him by the Congress, mandatorily, by the unequivocal words of his own regulation, required that each state's plan must include all fathers, who otherwise qualify, who *are employed less* than a given number of hours. In order otherwise to qualify, such a father must not have available to him from his own resources or other sources including strike benefits assets or income which place him outside of the needy category. Further, he must register for other work and for retraining and accept and participate in both in good faith. Considered in their sum total, the statute and the regulations provide safeguards to ensure that only needy fathers who are willing to be retrained if necessary, and to engage in other employment, can qualify for benefits which are made available primarily to help the children of such fathers. In Townsend v. Swank, *supra,* in which the Supreme Court held invalid that part of Illinois' AFDC program under which certain needy dependent children attending high school or vocational school

[28a] See Appendix B.

were eligible for benefits, but those attending college or university were not, Mr. Justice Brennan (at p. 505 of 92 S. Ct.) wrote:

> Thus King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that regulations of the Department of Health, Education, and Welfare seem to imply that States may to some extent vary eligibility requirements from federal standards. However, the principle which accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a) (10) that aid be furnished "to *all eligible* individuals." (Emphasis supplied.) King v. Smith, 392 U.S. at 333 n. 34. [88 S. Ct. 2128, 20 L. Ed. 2d 1118] [Footnote omitted.]

The following paraphrase of Mr. Justice Brennan's last-quoted sentence controls this case as to those involved in labor disputes: The principle which accords substantial weight to an agency's interpretation of its own regulation is inapplicable insofar as that interpretation is inconsistent with the requirements (in this case, mandatory requirements) of its own regulation validly promulgated under authority delegated to it by the Congress.[29] The Secretary could have authorized Maryland to exclude from AFDC-E benefits those out of work because of labor disputes. But, by regulation, the Secretary mandatorily required the opposite, and having so done, he may not ignore his own regulation. Accordingly, this Court holds that Maryland's Rule 200.X.A. (2), insofar as it denies AFDC-E benefits to those out of work because of involvement in labor

[29] *See also* Heffner v. United States, *supra;* United States ex rel. Brooks v. Clifford, *supra;* Hammond v. Lenfest, *supra.*

disputes, conflicts with the federal regulatory requirements promulgated by the Secretary, and that the plaintiff Francis and others similarly situated are entitled to relief herein.

[16] It follows from our conclusion that Maryland's program, insofar as Maryland fails to afford AFDC-E relief where fathers are out of work because of gross misconduct on because of involvement in labor disputes, is incompatible with federal regulatory requirements, and that the plaintiff Wright and others similarly situated and the plaintiff Francis and others similarly situated "are entitled to declaratory relief and an appropriate injunction by [this Court] against the payment of *federal* monies" in contravention of this Court's holding here, "should the State not develop a conforming plan within a reasonable period of time," Rosado v. Wyman, 397 U.S. *supra* at 420, 90 S. Ct. at 1222 (emphasis by Mr. Justice Harlan). This Court, having confidence that, if this Court's holdings herein become final, the State of Maryland will conform its plan, effective as of the date of the filing of this opinion and as required by this Court's declaration of the law herein, finds it unnecessary, at this time, to enjoin or otherwise issue any order to respondents herein.[29a]

V.

Maryland is required to disperse whatever public funds are available for AFDC-E benefits in accordance with this opinion. Rosado v. Wyman, *supra.*[30] *See*

[29a] The said obligations of the State of Maryland hereunder with regard to the labor involvement issue will of course be different if, forthwith, after the filing of this opinion, the Secretary of HEW amends 45 C.F.R. § 233.100(a) in accordance with the discretionary authority conferred upon him by, and within the confines of, 42 U.S.C. § 607 as construed in this opinion.

[30] Mr. Justice Harlan, in Rosado (at 420-421, 90 S. Ct. at 1222) wrote:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the

Henry v. Betit, 323 F. Supp. 418, 421 (D. Alaska 1971); Dews v. Henry, 297 F. Supp. 587-592 (D. Ariz. 1969). But there remains the question of whether the plaintiff Wright and the plaintiff Francis and others respectively similarly situated are entitled to be paid AFDC-E benefits not only prospectively from and after the date of the filing of this opinion, but retroactively. In Westberry v. Fisher, 309 F. Supp. 12 (D. Maine 1970), upon remand by a three-judge court to him as a single judge for determination of damage claims, Judge Gignoux was faced with a claim for retroactive AFDC benefits withheld during the period from the date of the filing of the complaint by the plaintiffs in that case, in which a class was established under Federal Civil Rule 23. Judge Gignoux held the defendants, who were state officials, not personally liable for damages under 42 U.S.C. § 1983, since those officials had acted "in good faith in performance of their official duty as they understood it." 309 F. Supp. *supra* at 18. In this case, there are no allegations that any of the defendant state officials did not perform their official duty in good faith as they understood that duty. While state officials are

Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. Abbott Laboratories v. Gardner, 387 U.S. 136 [87 S. Ct. 1507, 18 L. Ed 2d 681] (1967); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, [90 S. Ct. 827, 25 L. Ed. 2d 184] (1970); Barlow v. Collins, 397 U.S. 159 [90 S. Ct. 832, 25 L. Ed. 2d 192] (1970). We adhere to King v. Smith, 392 U.S. 309 [88 S. Ct. 2128, 20 L. Ed. 2d 1118] (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief and held Alabama's "substitute father" regulation to be inconsistent with the federal statute. While King did not advert specifically to the remedial problem, the unarticulated premise was that the State had alternative choices of assuming the additional cost of paying benefits to families with substitute fathers or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements.

liable under section 1983, under the doctrine of Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), and although Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288 (1967), only goes so far as to say that Congress, in enacting section 1983, did not intend "to abolish wholesale all common-law immunities," and while the Supreme Court "has not definitively spoken on the applicability of the doctrine of governmental immunity" [31] in actions brought under section 1983 against state administrative officials, this Court, as did Judge Gignoux, adopts Judge Magruder's views as expressed in Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953), and in Francis v. Lyman, 216 F.2d 583 (1st Cir. 1954). In the latter case, Judge Magruder concluded (at 588) that while "it is no defense to the state officials that they may have acted, not maliciously, but in the good-faith belief that they were performing their official duty under what they thought was valid state legislation" where they are dealing with problems of race discrimination, and may therefore be "said to act at their peril" in such situations, nevertheless, in other situations, "it seems to be the tendency of the decisions to restrict the application of the Civil Rights Act so as to avoid the appalling inflammation of delicate state-federal relationships which undoubtedly would ensue." *See also* the citations in Westberry v. Fisher, 309 F. Supp. *supra* at 17, of the opinions of other courts and writers written both before and after the Supreme Court's pronouncements in *Pierson*, which have followed Judge Magruder's approach, and the observation of Professor Davis that Judge Magruder's approach "seems likely to control the law of the future." 3 Davis, Administrative Law § 26.06, pp. 478-479 (1958).

[17] To the extent plaintiffs seek to hold defendants herein liable for damages under section 1983 in their official capacities as officers of the State of Maryland, "such a suit is in actuality one against the State, even though the State is not named as a defendant."[32]

[31] 309 F. Supp. *supra* at 16.

[32] Suits seeking injunctions against state officials who are attempting to enforce state statutes allegedly violative of the Federal Constitution fall into different classifications. Griffin

Westberry v. Fisher, *supra,* 309 F. Supp. at 18, and cases cited thereat. *See also* O'Neill v. Early, 208 F.2d 286, 289 (4th Cir. 1953).

[18] Approaching the case as one against the State, all claims herein for damages must fail. In the first place, the State is not a person within the meaning of section 1983. Monroe v. Pape, *supra,* 365 U.S. at 187-192, 81 S. Ct. 473, 5 L. Ed. 2d 492; Hewitt v. City of Jacksonville, 188 F.2d 423 (5th Cir.), cert. denied, 342 U.S. 835, 72 S. Ct. 58, 96 L. Ed 631 (1951); Westberry v. Fisher, *supra,* 309 F. Supp. at 18.

[19, 20] In the second place, the Eleventh Amendment[33] not only bars, without the consent of a state, a federal court suit against that state by citizens of another state, but also by citizens of its own state. Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 51, 64 S. Ct. 873, 88 L. Ed. 1121 (1944); Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890); Westberry v. Fisher, *supra,* 309 F. Supp. at 18. In this case, the defendants, speaking on behalf of the State of Maryland, have not only not waived that bar but indeed vigorously press it. Thus, at the very least, as Judge Winter wrote in Williams v. Dandridge, 297 F. Supp. 450, 452 n. 1, 469 (D. Md. 1968), the Eleventh Amendment does not permit this Court to require the State of Maryland to appropriate additional money to pay AFDC-E claims which would have been presented to and paid by the State of Maryland in years prior to the current fiscal year but for the disqualifying

v. County School Bd. of Prince Edward County, 377 U.S. 218, 228, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304, 72 S. Ct. 321, 96 L. Ed. 335 (1952); Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). *See* Rosado v. Wyman, *supra* 397 U.S. at 420, 90 S. Ct. 1207, 25 L. Ed. 2d 442.

[33] The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

provision of Maryland Rule 200.X.A. (2).[34] Additionally, this Court holds that the Eleventh Amendment, when asserted on behalf of the State as it is herein, precludes this Court from requiring payment of any such claims which have arisen, during the State's current fiscal year which commenced July 1, 1971, prior to the date of the filing of this opinion.[35] In so holding, this Court has scruntinized a number of cases in which monetary payments by states, relating to the past, have been required by federal courts. *See* the cases cited and the discussion of several of them in Westberry v. Fisher, 309 F. Supp. *supra* at 15, n. 5, 19, 20 n. 12. *See also* Doe v. Swank, 332 F. Supp. 61 (N.D. Ill. 1971); Grubb v. Sterrett, 315 F. Supp. 990 (N.D. Ind.), aff'd, 400 U.S. 922, 91 S. Ct. 187, 27 L. Ed. 2d 182 (1970); Doe v. Harder, 313 F. Supp. 575 (D. Conn.), app. dismissed, 399 U.S. 902, 90 S. Ct. 2202, 26 L. Ed. 2d 557 (1970); Brooks v. Yeatman, 311 F. Supp. 364 (M.D. Tenn. 1970), which have been decided since *Westberry.* But in most of these cases, the Eleventh Amendment problem was apparently either not raised or not faced. And in none of them has any satisfactory reason been advanced for voiding the bar of the Eleventh Amendment.

Whether retroactive payments are required under any HEW and/or Maryland regulations dealing with the subject of "corrected payments," *see* Grubb v. Sterrett, *supra,* 315 F. Supp. at 995; Westberry v. Fisher, *supra,* 309 F. Supp. at 20-21; Robinson v. Washington, 302 F. Supp. 842, 844 (D.D.C. 1968); and Solman v. Shapiro, 300 F. Supp. 409, 416 (D. Conn. 1969), poses a question which has not been fully briefed or argued in this case. For that reason and, even more importantly, because this Court has confidence that if this Court's holding herein becomes final, both HEW and the State of Maryland will take such steps, if any, as are required by their respective regulations in connection with the making of retroactive payments, this Court, at this

[34] Unless perhaps in connection with regulations of HEW and/or the State of Maryland as to which this Court expresses no opinion herein. See the discussion at p. 371 in the body of this opinion.

[35] See n. 34 *supra.*

time, does not believe it necessary or advisable to state any position or comment further in connection therewith, including whether or not the Eleventh Amendment bar has been lowered by any express or implicit undertaking by Maryland in connection with its acceptance of federal funds. If further developments lead any of the parties to believe that they are entitled to any relief in this Court with regard to the failure of either HEW and/or any Maryland or local administrative agency to make retroactive payments in accordance with its own regulations, further application for such relief may be timely made to this Court under such circumstances.

For the reasons set forth in this opinion, this Court holds that each of the plaintiffs and others respectively similarly situated are entitled to prospective relief only, but that, at least at this time, no decree or order would appear necessary to effectuate that prospective relief.[36]

It is so decreed and ordered.

APPENDIX A

42 U.S.C. § 607, as amended in 1968, provides:

§ 607. *Dependent children of unemployed fathers; definition*

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the umemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—

[36] See the discussion at p. 369 n. 30 *supra*, adopting Mr. Justice Harlan's approach in Rosado v. Wyman, *supra*.

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a) (19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b) (1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b) (2) of this section), under the program therein specified to refer such father to the Secretary of Labor pursuant to section 602(a) (19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 443(a) (2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any work and training program subject to the limitations in section 609 of this title or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

APPENDIX B

45 C.F.R. § 233.100(a), as promulgated in 1969, provides:

§ 233.100 *Dependent children of unemployed fathers.*

(a) *Requirements for State Plans.* If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV—Part A of the Social Security Act must, except as specified in paragraph (b) of this section:

(1) Include a definition of an unemployed father

(i) Which shall include any father who is employed less than 30 hours a week, or less than three fourths of the number of hours considered by the industry to be full time for the job, whichever is less, and

(ii) Which may include any father who is employed less than 35 hours a week, or less than the number of hours considered by the industry to be full time for the job, whichever is less.

(2) Include a definition of a dependent child which shall include any child of an unemployed father (as defined by the State pursuant to subparagraph (1) of this paragraph) who would be, except for the fact that his parent is not dead, absent from the home, or incapacitated, a dependent child under the State's plan approved under section 402 of the Act.

(3) Provide for payment of aid with respect to any dependent child (as defined by the State pursuant to subparagraph (2) of this paragraph) when the conditions set forth in subdivisions (i) (ii), and (iii) of this subparagraph are met:

(i) His father has been unemployed for at least 30 days prior to the receipt of such aid.

(ii) Such father has not without good cause, within such 30-day period prior to the receipt of such aid, refused a bona fide offer of employment or training for employment. Before it is determined that a father has refused a bona fide offer of employment or training for employment without good cause, the agency must make a determination that such an offer was actually made. (In the case of offers of employment made through the public employment or manpower agencies, the determination as to whether the offer was bona fide, or whether there was good cause to refuse it, will be made by that office or agency.) The father must be given an opportunity to explain why such offer was not accepted. Questions with respect to the following factors must be resolved:

(a) That there was a definite offer of employment at wages meeting any applicable minimum wage requirement and which are customary for such work in the community;

(b) Any questions as to the father's inability to engage in such employment for physical reasons or because he has no way to get to or from the particular job; and

(c) Any questions of working conditions, such as risks to health, safety, or lack of workman's compensation protection.

(iii) Such father (a) has six or more quarters of work (as defined in subdivision (iv) of this subparagraph), within any 13-calendar-quarter period ending within 1 year prior to the application for such aid, or (b) within such 1-year period, received unemployment compensation under an unemployment compensation law of a State or of the United States, or was qualified under the terms of subdivision (v) of this subparagraph) for such compensation under the State's unemployment compensation law.

(iv) A "quarter of work" with respect to any individual means a period (of 3 consecutive calendar months

ending on March 31, June 30, September 30, or December 31) in which he received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 213(a) (2) of the Act), or in which he participated in a community work and training program under section 409 of the Act or any other work and training program subject to the limitations in such section 409, or the work incentive program established under part C of title IV of the Act.

(v) An individual shall be deemed "qualified" for unemployment compensation under the State's unemployment compensation law if he would have been eligible to receive such benefits upon filing application, or he performed work not covered by such law which, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such benefits upon filing application.

(4) Provide for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education to assure maximum utilization of available public vocational education services and facilities in the State to encourage the retraining of individuals capable of being retrained.

(5) Provide for the denial of such aid to any such dependent child or the relative specified in section 406(a) (1) of the Act with whom such child is living,

(i) If, and for as long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) With respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(6) Provide that within 30 days after the receipt of aid with respect to such children, such unemployed fathers will be referred for participation in the Work Incentive Program, as provided in section 402(a) (19) of the Act and the regulations relating thereto.

(7) Provide, where application for aid with respect to a dependent child (as defined by the State pursuant to subparagraph (2) of this paragraph) is made within 6 months after the effective date of the modification of the State plan in accordance with the provisions in subparagraphs (1) through (6) of this paragraph, that the father of such child will be considered to have met the requirements of subparagraph (3) (iii) of this paragraph if he met such requirements at any time after April 1961 and prior to the date of such application.

(8) Provide, if the approved State plan in effect prior to January 1, 1968, including aid with respect to dependent children of unemployed parents, that for purposes of subparagraph (7) of this paragraph an individual who received such aid under such plan for the last month ending before the effective date of the modification referred to in subparagraph (7) of this section will be considered to have filed application for aid under the plan as modified on the day after such effective date.

APPENDIX C

Md. Ann. Code art. 95A, § 6 provides, in part:

§ 6. *Disqualification for benefits.*

An individual shall be disqualified for benefits—

(a) *Voluntarily leaving work.* * * *

(b) *Gross misconduct.*—For any week in which his unemployment is due to his having been discharged for gross misconduct connected with his work, if so found by the Executive Director. Such disqualification shall continue until such individual has become reemployed and has earnings therein equal to at least ten (10) times his weekly benefit amount. For the purposes of this article, the term "gross misconduct" shall include conduct of an employee which is (1) a deliberate and willful disregard of standards of behavior, which his employer had a right to expect, showing a gross indifference to the employer's interest, or (2) a series of

repeated violations of employment rules proving that the employee has regularly and wantonly disregarded his obligations. Misconduct not falling within this definition shall not be considered gross misconduct.

(c) *Discharge or suspension as a disciplinary measure.* * * *

(d) *Failure to apply for or accept work; determination of suitable work.* * * *

(e) *Stoppage of work because of labor disputes.*—For any week with respect to which the Executive Director finds that his unemployment is due to a stoppage of work, other than a lockout, which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Executive Director that—

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises.

(f) *Pregnancy.* * * *

(g) *Benefits under law of another state or of the United States.* * * *

(h) *Remuneration from pensions.* * * *

(i) *Dismissal payment or wages in lieu of notice.* * * *

APPENDIX D

The following excerpts from the legislative history of 42 U.S.C. § 607 would appear relevant:

In his message proposing AFDC-E legislation, President Kennedy stated:

> Under the aid to dependent children program, needy children are eligible for assistance if their fathers are deceased, disabled, or family deserters. In logic and humanity, a child should also be eligible for assistance if his father is a needy unemployed worker — for example, a person who has exhausted unemployment benefits and is not receiving adequate local assistance. Too many fathers, unable to support their families, have resorted to real or pretended desertion to qualify their children for help. Many other fathers are prevented by conscience and love of family from taking this route, thereby disqualifying their children under present law.
>
> I recommend that the Congress enact an interim amendment to the aid to dependent children program to include the children of the needy unemployed. Temporary action is recommended pending completion of a study of a permanent program to aid needy children and certain other groups now excluded from the Federal-State public assistance programs. [President's Message to Congress on Program for Economic Growth and Recovery, U.S. Code Cong. & Admin. News 1961, 87th Cong., 1st Sess., p. 1032.]

During the hearings before the House Committee on Ways and Means, the following colloquy between Mr. John W. Tramburg, of the American Public Welfare Association, and Representative Byrnes, a co-sponsor of the bill and ranking minority Committee member, occurred:

> Mr. Byrnes. Well, let me put it this way. I would take it that you do not believe that we should have a test of suitability of employment as a factor in determining whether the person is involuntarily unemployed, when it comes to the relief program?

> Mr. Tramburg. It seems to me that if there is a job available within the reasonable limits of his physical and mental capacities, and if he is drawing assistance and the expense of the assistance programs, we would certainly be within reasonable rights it seems to me to expect that even if it were only temporary until something else opened, he should take it. [Hearings on H.R. 3865 before the House Committee on Ways and Means, 87th Cong., 1st Sess., p. 241 (1961).]

When the bill was being debated in the House, Representative Byrnes stated:

> What the legislation does is to add the new category which says that if the breadwinner is able to work and if he is involuntarily unemployed and no work is available, we will treat that family in the same manner we treat the family when the breadwinner is dead, absent or incapacitated.
>
> I recognize, and I think the committee recognizes, that as we move into this category of involuntarily unemployed people, we do have an additional problem, namely, the determination of whether it is really involuntary unemployment. In the case of the disabled breadwinner, you can test that readily. In the case of his absence from the home, you can test that and determine whether for a fact that situation exists. The death of the breadwinner is a certainty. But here we do get the problem of determining whether, in fact, this person is involuntarily unemployed and I put the emphasis on the word "involuntary."
>
> If you will look at the Bill on page two, you will find the additions made by the committee to assure that aid would only go to children of the involuntarily unemployed beginning at line nine, page two, and going through to page three. That was added by the committee to try to assure that we will not be giving this relief to people who in a sense may be more or less voluntarily unemployed and who are refusing work. I think it is appropriate that this legislation is enacted on a temporary

basis so that we can see how it is administered by the States and those in charge of the program with respect to the determination of whether or not the people who receive this aid or the families who receive this aid are in a situation where the breadwinner is truly, in fact, involuntarily unemployed. I would serve notice on the Department here and now that if I am around in 1962 when this program expires, I certainly am going to want and demand detailed information as to how that aspect of the program has been administered. I think they should be in a position and should recognize now that the Committee will want to know how this aspect of the program has been administered and how it has worked. [107 Cong. Rec. 3528 (daily ed. March 10, 1961).]

Again, during the House Debate, Congressman Byrnes referred to the provisions of a section of the bill which "assure that aid would only go to children of the involuntarily unemployed * * *." 107 Cong. Rec. 3528.

But, on the same day during that debate, in answer to the question of Representative Domonick, Chairman Mills, of the House Ways and Means Committee, stated that states could, if they wished, grant AFDC benefits to strikers. 107 Cong. Rec. 3526 (daily ed. March 10, 1961).

The Report of the Senate Committee on Finance (87th Cong., 1st Sess., p. 3 (1961) stated:

> Your committee's bill, as does the House-passed bill requires that a State agency administering the expanded aid to dependent children program must enter into cooperative arrangements with the State agency administering the public employment offices looking toward the employment of the unemployed parents of the children receiving aid. The arrangements which the State public assistance agency will need to have with the employment service must include provisions for appropriate registration for work and periodic reregistration of the unemployed parent of a child and for otherwise making maximum utilization of

> the job placement services and other services and facilities of the employment office. The purpose of this provision is, so far as possible, to secure employment for the unemployed person in any jobs that may be available which there is not good cause for him to refuse as determined by the State.
>
> Your committee believes that an unemployed individual whose family is receiving aid under this program should accept any reasonable offer of employment. Accordingly, the bill would require that a State plan include provisions to assure that aid is not provided if, and for as long as, the unemployed parent refuses without good cause to accept employment in which he is able to engage. Considerable latitude would be left to the State in determining the period during which assistance would be denied. It is not intended to permanently disqualify the family during subsequent periods when no offer of employment is available. The state would determine whether the parent had good cause for refusing an offer of employment.

In 1967, speaking before the Senate Committee on Finance in connection with the pending amendments, Mr. Wilbur Cohen, then Under Secretary of HEW and later to become HEW Secretary, stated:

> Well, I would say, Senator, that in view of the fact that the Federal Government is spending several billion dollars in Federal funds in the welfare program, we should give priority to a total program of work and making people independent, people that are on the welfare rolls. That is a cost to the general taxpayer. These are people who the general taxpayer is supporting and to the maximum extent that it is feasible, priority should be given to helping the States and the localities have a total program in which work is a central part. . . . [Hearings on HR 1208, before the Senate Committee on Finance, 90th Cong., 1st Sess., p. 264 (1967).]

In 1967, when the House Ways and Means Committee proposed what eventually became the amendments to 42 U.S.C. § 607, its report stated with regard thereto:

> A major characteristic of the law is the authority left to the States to define "unemployment." Your committee believes that this has worked to the detriment of the program because of the wide variation in the definitions used by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other States, the definitions have gone beyond anything that the Congress originally envisioned. Your committee's bill is designed to correct this situation and to make other improvements in the program.
>
> The overall objective of the amendments proposed by the Committee is to authorize a Federal definition of unemployment by the Secretary (but within certain limits set forth in the legislation), to tie the program more closely to the work and training program authorized by the bill, and to protect only the children of unemployed fathers who have had a recent attachment to the work force. With these changes, the committee recommends that the program become a permanent part of the Social Security Act, still on an optional basis with the States. [H.R. Rep. No. 544, 90th Cong., 1st Sess., pp. 107-08 (1967). *See also* S. Rep. No. 744, 90th Cong., 1st Sess., p. 160 (1967), U.S. Code Cong. & Admin. News 1967, p. 2834.]

In a July 8, 1969 message to Congress, President Nixon stated that "a worker who exercises his right to strike is not involuntarily unemployed" (115 Cong. Rec. 1853 (1969)).

MEMORANDUM AND ORDER

In The United States District Court
For The District of Maryland

Civil No. 71-853-K

Robert Francis, etc., et al.
v.
Rita C. Davidson, etc., et al.

Plaintiffs have filed herein, on February 9, 1972, a Motion for Immediate and Final Injunctive Relief and also, apparently in connection with said motion, interrogatories addressed to the defendant Rita C. Davidson. Counsel have also suggested that the failure of this Court clearly to grant or deny injunctive relief might be the cause of confusion if either party desired to appeal. *See Gunn v. University Committee to End War in Viet Nam,* 399 U.S. 383 (1970); *Mitchell v. Davidson,* 398 U.S. 42 (1970).

At page 34 of the opinion filed in this Court on January 28, 1972, the following sentence appears:

> This Court, having confidence that, if this Court's holdings herein become final, the State of Maryland will conform its plan, effective as of the date of the filing of this opinion and as required by this Court's declaration of the law herein, finds it unnecessary, at this time, to enjoin or otherwise issue any order to respondents herein.

The above-quoted sentence on page 34 is hereby changed to read as follows, effective as of the date of this Memorandum and Order:

> This Court has confidence that if no appeal is taken from this Court's opinion, or, if an appeal is

taken, then if this Court's opinion is affirmed on appeal, the State of Maryland will conform its plan, effective as of the date of the filing of this Court's opinion, namely, January 28, 1972, as required by this Court's declaration of the law herein, without any injunction being issued by this Court. Therefore, this Court hereby denies, at this time, plaintiffs' request for an injunction herein. *Cf. Gunn v. University Committee to End War in Viet Nam,* 399 U.S. 383 (1970); *Mitchell v. Davidson,* 398 U.S. 42 (1970).

The Motion for Immediate and Final Injunctive Relief, referred to hereinabove, is hereby denied. The interrogatories addressed to the defendant Rita C. Davidson, in connection with said motion, need not be answered by the said defendant. If the State of Maryland does not forthwith conform its plan at the expiration of the appeal period, if no appeal is taken, or, if an appeal is taken, after affirmance on appeal of this Court's opinion in this case, in accordance with this Court's opinion, the plaintiffs may, at that time, reapply to this Court for injunctive relief.

It is So Ordered, this 23rd day of February, 1972.

HARRISON L. WINTER,
United States Circuit Judge,
FRANK A. KAUFMAN,
United States District Judge,
JOSEPH H. YOUNG,
United States District Judge.

MEMORANDUM AND ORDER
(Filed March 1, 1972)

In The United States District Court
For The District of Maryland

Civil No. 71-853-K

Robert Francis, etc., et al.
v.
Rita C. Davidson, etc., et al.

Footnote 15 on page 8 of the opinion filed in this case on January 28, 1972 is hereby amended, effective as of the date of January 28, 1972, by striking the period at the end of that footnote and adding the following words: "except administrative review. Defendants concede that the pursuit of administrative review would have been, and remains as of this date, futile."

It is So ORDERED, this 1st day of March, 1972.

HARRISON L. WINTER,
United States Circuit Judge,
FRANK A. KAUFMAN,
United States District Judge,
JOSEPH H. YOUNG,
United States District Judge.

ORAL OPINION OF THE COURT
(March 1, 1972)

In The United States District Court
For The District of Maryland

Civil No. 71-853-K

Robert Francis, et al.

v.

Rita C. Davidson, et al.

Defendants.

The above-entitled case came on for hearing before The Honorable Harrison L. Winter, Associate Judge, U.S. Court of Appeals, Fourth Circuit, The Honorable Frank A. Kaufman, Associate Judge, U. S. District Court for the District of Maryland, and The Honorable Joseph H. Young, Associate Judge, U. S. District Court for the District of Maryland, at 2:40 o'clock p.m.

Appearances

For the Plaintiffs:

C. Christopher Brown and Curtis L. Decker. For the Defendants:

Joel J. Rabin and Judson P. Garrett, Jr.

(Judge Winter) Gentlemen, we think that we can arrive at a decision and state our reasons orally from the Bench this afternoon.

Judge Kaufman will speak for the Court.

(Judge Kaufman) Gentlemen, I think all the members of this Court want to compliment counsel in the case for the way in which the case was presented, and certainly compliment the State for all the efforts that have been

made to try to take care of the emergency situations which have arisen.

Originally, this Court was informed that counsel on both sides thought that the emergencies that cropped up could be taken care of as they came along. However, we have now been given information by plaintiffs, embodied in the material submitted by Mr. Brown in the motion for reconsideration which is before this Court today and in the several documents which he has filed within the last twenty-four to forty-eight hours.

Turning to the standards which are set forth in Long v. Robinson, 432 F.2d 977, particularly at page 979, that being a Fourth Circuit 1970 opinion written by Judge Winter, and another opinion, which Judge Winter also authored, West Virginia Highlands Conservancy v. Island Creek Coal Company, 441 F.2d 232, Fourth Circuit 1971, this Court has come to the conclusion that the motion of the plaintiffs for immediate injunctive relief should be granted insofar as the subclass composed of those who are unemployed because of discharge for misconduct is concerned.

Similarly, under those standards and for reasons which will be stated in a moment, the motion for injunctive relief will be granted with regard to the other subclass, namely, those out of work because of labor involvement.

However, with regard to that latter subclass, the injunctive relief which this Court grants today will be stayed pending appeal.

Insofar as the injunction concerning the subclass of those who are out of work, because of discharge for misconduct is concerned, there will be no stay. The Order of this Court granting the injunction will be effective immediately as of now.

Long v. Robinson sets forth four standards. As has been indicated during the colloquy between Judge Winter and one or more of counsel, those four standards do not each have to be met in order for injunctive relief to be granted and in order for any request for a stay to be denied.

Nevertheless, turning to each one of the standards and considering the problem before this Court in connection with the subclass which for short-cut purposes I will call the misconduct subclass, it would seem that each one of the Long v. Robinson standards is met in terms of the position advanced today by the plaintiffs.

First of all, in the opinion of this Court, this Court believes that the plaintiffs will likely prevail on the merits of the appeal.

Second, the facts which have been presented to us, incontrovertible facts, facts which the State commendably in no way disputes and which the State has helped bring before this Court in a most cooperative manner, established beyond doubt that irreparable harm will be suffered by at least three families if a stay of relief continues.

Insofar as the State is concerned and the possibility of substantial harm being incurred, we note the absence of any figures or data today other than rough estimates and general estimates.

However, the injunctive relief being granted today is without prejudice to the State to apply to this Court for the institution of a stay in connection with the injunctive relief which we make effective today with regard to the misconduct class if pending appeal new facts or new evidence come to the attention of the State which in the State's judgment require that an application be made for a stay of the injunctive relief which we are putting in force and effect today.

The fourth Long v. Robinson standard is the public interest, and it is hard for this Court to ascertain how the public interest will be served under these circumstances by allowing persons to be put in positions of extreme hardship, which the plaintiffs' evidence indicates they are currently being put, or at least three families are being put and there is reason to believe that other families are in a similar position.

With regard to the defendants' application for an immediate injunction covering the second subclass, the

subclass composed of those out of work because of labor involvement, this Court grants the injunction but will stay the effect of the injunction pending appeal.

That grant of the stay is without prejudice to plaintiffs' reapplying to this Court for a removal of that stay and for an immediate injunction covering that subclass, should new facts or new evidence come to the attention of the plaintiffs which cause the plaintiffs to believe that this Court should be asked to reconsider its stay of relief with regard to the labor involvement subclass.

Counsel are asked to confer and to prepare an order. If counsel can agree upon the words of the Order, they are asked only to present the Order. If not, plaintiffs' counsel are asked to present the Order, with comments by counsel for the defendants. That should be done as quickly as possible.

However, in the meantime, the injunctive relief granted today, subject to the provisions which I have orally stated in the last few moments, becomes effective immediately as of this moment.

(Judge Winter) Judge Young, do you have any comments or any additions you want to make?

(Judge Young) No.

(Judge Winter) I have none either, and I concur in Judge Kaufman's statement of the Court.

Now, you understand, gentlemen, that we consider the injunction in effect. As far as formalizing the injunction, we want you to try to agree on the language. If you cannot agree on the language, of course then we will hear you, at least informally, on your disagreements and enter an appropriate Order of our own.

I might add also that Judge Young will not be available for a period of some days after this afternoon. However, Judge Kaufman and I expect to be here continuously and we can sign the Order for the Court.

When you have an Order prepared, may I suggest that you submit it to Judge Kaufman as the managing Judge of the Court.

If there is nothing further, gentlemen, we will adjourn for the day.

Thank you very much.

(Thereupon, the hearing was concluded.)

ORDER
(Filed March 6, 1972)

In The United States District Court
For The District of Maryland

Civil No. 71-853-K

Robert Francis, et al.,
Plaintiffs,
v.
Rita C. Davidson, et al.,
Defendants.

Upon consideration of Plaintiffs' Motion To Reconsider Denial of Motion For Immediate and Final Injunctive Relief; Defendants' response thereto; the record, pleadings and affidavits in this matter; and the oral arguments of both parties thereon; and

In accordance with and for the reasons set forth in our findings and opinion announced in open Court on the 29th day of February, 1972, which reasons are incorporated herein by this reference thereto,

This Court finds that Plaintiffs are suffering and will suffer irreparable injury unless Defendants are permanently enjoined from denying public assistance under the program of Aid to Families With Dependent Children of Unemployed Fathers (AFDC-E) to persons who are

eligible for such assistance but for the fact that such persons are disqualified for Unemployment Insurance benefits as a result of misconduct in their previous employment or involvement in a labor dispute.

Whereupon, it is this 6th day of March, 1972, Ordered, Adjudged and Decreed:

1. That Plaintiffs' MOTION TO RECONSIDER etc., and PLAINTIFFS' MOTION FOR IMMEDIATE AND FINAL INJUNCTIVE RELIEF be and the same hereby are granted; and

2. That Defendants Rita C. Davidson and Irene Olson, their successors in office, agents, employees, and other persons in active concert or participation with them be and they hereby are PERMANENTLY ENJOINED AND RESTRAINED from refusing to grant public assistance under the AFDC-E program to persons otherwise eligible for such assistance but for the fact that such persons are disqualified for Unemployment Insurance benefits as a result of misconduct in their previous employment or involvement in a labor dispute; and

3. That, pending an appellate decision on the merits, the aforegoing injunction is hereby STAYED with respect to the sub-class of persons disqualified for Unemployment Insurance benefits due to involvement in a labor dispute; and

4. That the issuance of the aforesaid STAY is without prejudice to the right of the Plaintiffs to apply for reconsideration thereof in the light of new facts or evidence; and

5. That the denial of a STAY of the aforesaid injunction with respect to the sub-class of persons disqualified for Unemployment Insurance benefits by reason of misconduct is without prejudice to the right of the Defendants to apply for reconsideration thereof in the light of new facts or evidence; and

6. That costs be borne by the Defendants.

HARRISON L. WINTER,
United States Circuit Judge,
FRANK A. KAUFMAN,
United States District Judge.

MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

In the Supreme Court of the United States

October Term, 1972

No. 71-1447
Rita C. Davidson, et al., Appellants
v.
Robert Francis, et al.

No. 71-1554
Chamber of Commerce of the United States,
Appellant,
v.
Robert Francis, et al.

On Appeals From
The United States District Court
For The District of Maryland

This memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the view of the United States.

QUESTION PRESENTED

Whether Maryland Social Services Administration Rule 200.X.A.2, barring payment of certain welfare benefits both to individuals disqualified for unemployment insurance and to families of such individuals, is

valid under Department of Health, Education, and Welfare Regulation 223.100(a)(1).[1]

INTRODUCTION AND STATEMENT

This case involves the validity, under regulations promulgated by the Secretary of Health, Education, and Welfare, of certain provisions of Maryland's federally-assisted program of aid to families with dependent children of unemployed fathers ("AFDC-UF"). Federal payments on behalf of such State programs are authorized by Section 401 of the Social Security Act, 42 U.S.C. 601. Section 407(a) of that Act defines "dependent child" as including a "needy child * * * who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *," and Section 407(b) provides that in order to qualify for federal assistance, a State AFDC-UF program must provide payment of aid to any family with a dependent child when, with limitations not here relevant, "such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days * * *."

Pursuant to the Secretary's authority to prescribe standards for the determination of the definition of "unemployment" to be used in State AFDC-UF programs, the following regulation, 45 C.F.R. 233.100(a)(1), was promulgated:

> If a State wishes to provide AFDC for children of unemployed fathers, the State plan must * * * [i]nclude a definition of an unemployed father
>
> (i) [w]hich shall include any father who is employed less than 30 hours a week[2] * * * and
>
> (ii) [w]hich may include any father who is employed less than 35 hours a week * * *.

---

[1] The Appeal in No. 71-1554 also challenges the district court's denial of the motion by the United States Chamber of Commerce to intervene. We express no opinion on that issue.

[2] After this action was instituted, the regulation was amended to read "* * * less than 100 hours per month * * *" 36 Fed. Reg. 13604 (July 22, 1971).

The purpose of the regulation was to establish a uniform hours-worked criterion for determining unemployment. Indeed, the wide variation in State hours-worked criteria was the main reason the Secretary was given authority in 1968 to prescribe federal standards under Section 407. See *Macias v. Finch,* 324 F. Supp. 1252, 1256-1257 (N.D. Cal.). The Secretary had not intended to do more than set a general hours-worked standard and had contemplated that the States would remain free to vary the coverage of their programs, on the basis of factors other than the number of hours worked, in accordance with their differing needs and policies. Thus it is the position of the Secretary that the standards prescribed by Regulation 233.100(a)(1) and by Section 407(b) do not constitute a complete and exclusive definition of "unemployment" or of "unemployed father."

Maryland Social Services Administration Rule 200.X.A.2 denies assistance under the Maryland AFDC-UF program when the father is disqualified for State unemployment insurance. Under Maryland law, strikers and persons discharged from employment due to "gross misconduct" are among those so disqualified. As a consequence, the Maryland program excludes from coverage some persons who work less than 30 hours a week and satisfy the other coverage requirements of Section 407(b). The Maryland program, however, does adopt the federal hours-worked criterion for the purpose of determining generally whether a person is unemployed. Therefore, the Secretary's approval of the Maryland AFDC-UF program was consistent with his interpretation of Regulation 233.100(a)(1).[3]

[3] Of course, approval of the Maryland program for purposes of federal assistance does not indicate that the Secretary deems the exclusion of families of men disqualified for unemployment insurance to be desirable. To the contrary, the Secretary has strongly recommended that State AFDC-UF programs should provide the maximum coverage permitted by the Social Security Act and the regulations thereunder. The Secretary has also concluded, however, that, within appropriate limits, this question of coverage is one best left to the States.

This action was instituted after appellees and their families were denied Maryland AFDC-UF assistance solely because they were disqualified for State unemployment insurance.[4] The complaint contended that Rule 200.X.A.2 was invalid under both the Equal Protection Clause of the Fourteenth Amendment and the Secretary's regulation; declaratory and injunctive relief was requested. A three-judge district court was convened pursuant to 28 U.S.C. 2281.[5] Applying *Dandridge v. Williams,* 397 U.S. 471, the court determined that the exclusionary classifications prescribed by Rule 200X.A.2 had a reasonable basis and accordingly held that the Rule does not violate appellees' rights to equal protection.[6]

In the exercise of its pendent jurisdiction, however, the court held that Rule 200X.A.2 was invalid under the Secretary's regulation. It reasoned that the language of the regulation could only be read as requiring participating States to include within the coverage of their AFDC-UF programs, without exception, the families of all fathers who worked less than 30 hours per week and satisfied the other requirements set forth in Section 407(b). The court determined that appellees were entitled to prospective relief only and enjoined appellants (in No. 71-1447) from refusing to grant assistance to persons eligible for assistance but for the fact that they are disqualified for unemployment insurance as a result of their misconduct in previous employment or their involvement in a labor strike.[7]

[4] Appellee Francis was disqualified because he was out of work due to a labor dispute; appellee Wright had been discharged from his previous employment for "gross misconduct."

[5] Appellants challenge the jurisdiction of the three-judge district court, contending that the constitutional claim was insubstantial. We express no opinion on that contention.

[6] We agree with the district court's decision on the constitutional issue and believe that it requires no further discussion in this memorandum.

[7] The injunction was stayed pending appeal with respect to persons disqualified for unemployment insurance by reason of involvement in a labor strike.

DISCUSSION

Long-standing principles of regulatory interpretation and administrative law require that deference be accorded to the Secretary's interpretation of his own regulations. *Udall v. Tallman*, 380 U.S. 1, 16-18. The decision below, however, illustrates that there is at least a legitimate basis for disagreeing with the current administrative interpretation of Regulation 233.100(a)(1). Therefore, in view of the conflicting constructions which have been placed on the regulation and the resulting potential for confusion in other States about its proper interpretation in these and other circumstances, the Secretary has determined to amend the regulation in a manner consistent with his original intent, in order to clarify its meaning. We are informed that under the proposed revision the regulation will expressly permit the States to vary, within limits, the coverage of their programs on the basis of factors other than the number of hours worked. This revision should remove any doubt concerning the validity of Maryland's Rule 200.X.A.2. Such a regulation is clearly within the authority granted by the basic statute. In these circumstances, this case does not warrant plenary review by this Court.

CONCLUSION

For the foregoing reasons, the judgment below should be summarily affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

August 1972.

Rita C. Davidson, Secretary, Maryland Department of Employment and Social Services, et al.,
Appellants,

v.

Robert Francis, etc., et al. No. 71-1447.

Appeal from the United States District Court for the District of Maryland.

Former decision, 408 U.S. 920, 92 S. Ct. 2495.

Facts and opinion, D.C., 340 F. Supp. 351.

Oct. 16, 1972. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed.

In the United States District Court
For the District of Maryland

December 10, 1973

C. Christopher Brown, Esq.
Mrs. Diana G. Motz
James P. Garland, Esq.
Rob Ross Hendrickson, Esq.
George Beall, Esq.

Dear Mrs. Motz and Gentlemen:

Re: Francis, et al. v. Davidson, et al.
Civil No. 71-853-K

Judges Winter and Young and I have conferred with regard to this case and have concluded that, for reasons set forth by this Court in its opinion filed January 28, 1972, and in the light of the amendments to the applicable federal regulations, set forth in 38 Fed. Reg. 18549, effective July 12, 1973, the motion of the defendants to dissolve the injunction previously granted by this Court should be granted. We are also of the opinion that the motion for intervention on behalf of the Chamber of Commerce of the United States should be granted. Accordingly, we request that counsel for the defendants and counsel for the proposed intervenor submit appropriate orders to this Court, with copies to counsel for plaintiffs, defendants, and the proposed intervenor, as well as to any other party which has enjoyed the status of amicus curiae in this case, on or before December 21, 1973.

Intervention at this time by the Chamber of Commerce will not cause any delay in the determination of the issues currently before this Court. That was not the situation when intervention was originally applied for.

At that time, intervention would almost certainly have caused substantial delay.

Very truly yours,

FRANK A. KAUFMAN.

cc: Honorable Harrison L. Winter
Honorable Joseph H. Young

MEMORANDUM AMICUS CURIAE OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

In the United States District Court
For the District of Maryland

Civil No. 71-853-K

Robert Francis, et al.

v.

Rita C. Davidson, et al.

Introduction

This memorandum is submitted pursuant to the Court's request of January 8, 1974.

The Secretary of the United States Department of Health, Education, and Welfare (hereinafter "the Secretary") respectfully states that the defendants' Motion to Dissolve the Injunction Previously Issued,

filed on September 14, 1973, should be granted by this Court in that the Secretary's regulation promulgated at 38 Federal Register 18549 (July 12, 1973) was expressly promulgated in accordance with the suggestion of this Court in its prior opinion on this matter and that said regulation is consistent with the applicable provisions of the Social Security Act and within the Secretary's discretionary authority. Furthermore, the plaintiffs' Motion for Reconsideration is without merit and should in no way affect the dissolution of the Court's prior injunction.

This memorandum is directed solely to the issues arising under the Social Security Act and the implementing HEW regulations. The Secretary expresses no opinion as to whether the provision of AFDC-E to individuals participating in a labor dispute is contrary to federal labor laws and national labor policy.

Statement of the Case

On February 7, 1972, this Court held that Rule 200.X.A.2 of the Social Services Administration, Department of Employment and Social Services, of the State of Maryland, which denied assistance under the Maryland AFDC-E program when the father was found disqualified for state unemployment insurance, was violative of the Secretary of HEW's regulation promulgated at 45 C.F.R. 233.100(a)(1). Under the Maryland Rule, strikers and persons discharged from employment as a disciplinary measure or due to "gross misconduct" are among those so disqualified. Pursuant to that decision, on March 6, 1972, this Court enjoined the operation of the Maryland Rule, specifically enjoining the defendants from "refusing to grant public assistance under the AFDC-E program to persons otherwise eligible for such assistance but for the fact that such persons are disqualified for unemployment insurance benefits as a result of misconduct in their previous employment or involvement in a labor dispute." In its underlying opinion, this Court explained that the basis for its decision was a determination that the Maryland Rule "conflicts with the federal regulatory requirements" promulgated by the Department of HEW. See

Francis v. Davidson, 340 F. Supp. 351, 368 (D.C. Md., 1972).

In response to HEW's *amicus* memorandum filed in September, 1971, at the invitation of the Court, this Court stated that:

> "The said obligations of the State of Maryland hereunder with regard to the labor involvement issue will of course be different if, forthwith, after the filing of this opinion, the Secretary of HEW amends 45 C.F.R. § 233.100(a) in accordance with the discretionary authority conferred upon him by, and within the confines of, 42 U.S.C. § 607 as construed in this opinion." 340 F. Supp. at 368-9, footnote 29a.

Acting expressly on this suggestion, and in accordance with this Court's statutory construction that "Congress used words which did not mandatorily require each state to adopt the same meaning of the word 'employment' . . .," 340 F. Supp. at 367; the Secretary of HEW proposed (38 Federal Register 18549, July 12, 1973), a modification to his regulation authorizing states to adopt the Maryland policy at issue in this litigation. The introduction to the Secretary's proposed regulation expressly stated that it was being considered as a result of this Court's prior decision.

Therefore, the basis for this Court's previously issued injunction barring implementation of the Maryland Rule no longer exists and such injunction should be dissolved.

Applicable Law

42 U.S.C.A. § 607, as amended in 1968, provides as herein relevant:

§ 607. Dependent children of unemployed fathers; definition.

(a) The term "dependent child" shall notwithstanding section 606(a), include a needy child who meets the requirements of section 606(a)(2), who has been deprived of parental support or care by

reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) shall be applicable to a State if the State's plan approved under section 602—

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

. . .

The federal regulation, 45 C.F.R. 233.100(a), 34 Fed. Reg. 1146 (Jan. 24, 1969) which was found to be violated by Maryland Rule 200.X.A.2, provided in pertinent part that:

If a State wishes to provide AFDC for children of unemployed fathers, the State plan . . . must [with exceptions not here relevant]:

(1) include a definition of an unemployed father

(i) which shall include any father who is employed less than 30 hours a week, or less than three-fourths of the number of hours considered by the industry to be full time for the job, whichever is less, . . ."

That federal regulation, 45 C.F.R. 233.100(a), was amended, 38 Fed. Reg. 18549, effective July 12, 1973 to provide (new language underscored):

If a State wishes to provide AFDC for children of unemployed fathers, the State plan . . . must [with exceptions not here relevant]:

(1) include a definition of an employed father. . . . Such definition must include any father who:

(1) is employed less than 100 hours a month, or

(ii) exceeds that standard for a particular month, if his work in intermittent. . . . *except that, at, the option of the State such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.*

The Maryland Rule, formerly Social Services Administration Rule 200.X.A.2, which was enjoined as violative of the federal regulation provided as follows:

A grant may not be paid from GPA or AFDC-E:

. . .

2. To meet need due to being *disqualified for unemployment insurance.* (Emphasis supplied.)

Section 6 of Maryland's Unemployment Insurance Law, *Md. Anno. Code* Art. 95A provides in relevant part:

An individual shall be disqualified for benefits—

(b) *Gross misconduct.* — For any week in which his unemployment is due to his having been discharged for gross misconduct connected with his work. . . .

(c) *Discharge or suspension as a disciplinary measure.* — For the week in which he has been discharged, or suspended as a disciplinary measure, for conduct connected with his work. . . .

(e) *Stoppage of work because of labor disputes.* — For any week with which the Executive Director finds that his unemployment is due to a stoppage of work, other than a lockout, which exists because of a labor dispute. . . .

Argument

I. The Only Basis for the Injunction was the Finding that the Maryland Rule Violated 45 C.F.R. 233.100.

Plaintiffs' complaint alleged that Maryland Rule 200.X.A.2. was invalid under the Equal Protection and Due Process Clauses of the Constitution; Section 407 of the Social Security Act, 42 U.S.C.A. 607; and the Secretary's regulation, 45 C.F.R. 233.100. However, it is clear that the only ground on which the Court based its injunction was the conflict that the Court found between the Maryland Rule and the HEW regulation. As the Court stated:

> "It follows from our conclusion that Maryland's program, insofar as Maryland fails to afford AFDC-E relief where fathers are out of work because of gross misconduct or because of involvement in labor disputes, is incompatible with federal regulatory requirements . . ." 340 F. Supp. at 368.

Applying *Dandridge v. Williams*, 397 U.S. 471, this Court determined that there is a rational basis for the state's decision to deny public assistance to those ineligible for unemployment insurance, and that, therefore, Maryland's Rule is constitutional.

This Court also overruled plaintiffs' statutory claim, specifically with regard to the labor dispute disqualification and by necessary implication with regard to the gross misconduct and discharge as a disciplinary measure disqualification.

As to the labor dispute disqualification, this Court specifically found that the statute, 42 U.S.C.A. 607, permitted the Secretary to authorize a labor dispute disqualification option, but that the federal regulation then in effect expressly prohibited such an option. 340 F. Supp. at 367-368.

Absent the same prohibitory regulation, the Court also implied that the federal statute is broad enough to permit the Secretary to authorize a gross misconduct and discharge as a disciplinary measure disqualification option. The Court stated,

> "It is true that such approval [HEW approval of Maryland's Rule] is entitled to considerable weight by this Court, particularly when Congress has delegated policy-making to the agency."

340 F. Supp. at 365. Thus, with regard to the part of the Maryland Rule involving fathers who were discharged because of gross misconduct or as a disciplinary measure, the Court concluded it was only the "unambiguous and mandatory language" of the then existing federal *regulation* which conflicted with the Maryland Rule.

II. Due to the Amendment of the Federal Regulation, 45 C.F.R. 233.100, the Injunction of the Maryland Rule Should Be Dissolved Pursuant to F.R.C.P. 60 b (5).

As we have stated, pursuant to 38 Federal Register 18549 (July 12, 1973), 45 C.F.R. 233.100(a) has been amended so that the states' definition as to unemployed fathers:

> "need not include a father whose employment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State unemployment insurance law."

This change in the Secretary's regulation specifically authorizes states to implement the enjoined Maryland Rule and, as a matter of fact, was amended as a result of this Court's prior decision after careful consideration of this Court's suggestion that such action be taken. 340 F. Supp. at 368, footnote 29a.

Due to this action by the Secretary, the existing injunction of the Maryland Rule should be dissolved pursuant to the provisions of Rule 60b(5) of the Federal Rules of Civil Procedure, as defendants' have so moved. Rule 60b(5) allows relief from a judgment where "it is no longer equitable that the judgment should have prospective application." As found by the United States

Supreme Court in a case involving the amendment of the Railway Labor Act:

> "There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen." *System Federation No. 91, Railway Employees v. Wright,* 364 U.S. 642, 644-645 (1961).

The Secretary submits that his recent amendment to 45 C.F.R. 233.100(a) which specifically authorizes the enjoined Maryland Rule, has removed the basis for this Court's injunction and therefore the continuation of said injunction of the Maryland Rule is no longer equitable. *Tobin v. Alma Mills,* 172 F.2d 133, 136 (4 Cir. 1951) *cert. denied,* 343 U.S. 933 (1952); *Pennsylvania v. Wheeling & Belmont Bridge Company,* 59 U.S. 421 (1856).

III. Plaintiffs' Contentions, Previously Rejected by the Court, Continue to Lack Merit.

As we have previously stated, this Court has already rejected plaintiffs' constitutional and statutory claims. As there has been no factual or legal change therein, this Court's prior determination is binding on the plaintiffs and may not now be relitigated.

Furthermore, plaintiffs' continuing attack on the amended HEW regulation ignores the fact that virtually all of plaintiffs' arguments were previously made to this Court and have been expressly or impliedly rejected by this Court in its prior opinion at 340 F. Supp. 351, affirmed 409 U.S. 904. In fact, the said decision specifically indicated that a regulation such as the amended HEW regulation would be appropriate and would validate the Maryland Rule. 340 F. Supp. at 368, footnote 29a.

The Supreme Court has stated, "the rule of the law of the case is a rule of practice, based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter." *USA and I.C.C. v. Smelting, Refining and Mining Co.,* 339 U.S. 186. As

such is the case here, this Court's previously issued injunction should be dissolved on the above stated grounds.

IV. The Secretary's Regulation is Consistent with Section 407 of the Social Security Act and This Court's Prior Determination on This Matter.

Assuming, *arguendo,* that this Court determines that its prior decision and the subsequent amendment of the HEW regulation are not in and of themselves a sufficient basis on which to dissolve the injunction previously granted, but that further consideration is necessary, the Secretary asserts that the amended regulation is consistent with both Section 407 of the Social Security Act and this Court's prior determination of this matter.

A. The Extent of the Federal Definition of Unemployment.

As the Secretary stated in his prior *amicus* brief, when Congress first enacted an unemployment segment to the AFDC program, section 407 of the Social Security Act expressly referred to "unemployment (as defined by the *State*)." [Emphasis supplied]. P.L. 87-31, sec. 1. However, this section 407 was amended by P.L. 90-248, section 203(a), effective January 1, 1968 and still in effect, and now refers to "unemployment (as determined in accordance with standards prescribed by the Secretary.)" The report of the House Ways and Means Committee gave the following explanation:

> A major characteristic of the law is the authority left to the States to define "unemployment." Your committee believes that this has worked to the detriment of the program because of the wide variation in the definitions used by the States. In some instances, the definitions have been very narrow so that only a few people have been helped. In other States, the definitions have gone beyond anything that the Congress originally envisioned. Your committee's bill is designed to correct this situation and to make other improvements in the

> program. The overall objective of the amendments proposed by the Committee is to authorize a federal definition of unemployment by the Secretary (but within certain limits set forth in the legislation), to tie the program more closely to the work and training program authorized by the bill, and to protect only the children of unemployed fathers who have had a recent attachment to the work force. With these changes, the committee recommends that the program become a permanent part of the Social Security Act, still on an optional basis with the States. H.R. Rep. No. 544. 90th Cong., 1st Sess. 160 (1967).

Thus, there was clearly to be a greater degree of federal direction with regard to the definition of unemployment, with consequently greater uniformity among the states. Nevertheless, the language both of the Act and the committee reports falls short of mandating a single, exclusive federal definition.

This view was specifically recognized by this Court in its previous decision on this matter, 340 F. Supp. at 367, wherein the Court held:

> . . . [I]t is to be noted that when Congress removed the parenthetical words "as determined by the State," and substituted the words "as determined in accordance with standards prescribed by the Secretary." Congress did not simply substitute the words "as determined by the Secretary."

Thus, Congress clearly chose words which did not direct the Secretary to require each state to adopt the same meaning of the word "unemployment" but instead merely authorized the Secretary to prescribe standards circumscribing the states' determinations of the definition of "unemployment."

Furthermore, in their opposition to defendants' motion to dissolve the injunction, plaintiffs reliance on the legislative history to support their position that 42 U.S.C.A. §607 requires a single, exclusive federal definition of "unemployment" is misplaced. First, in doing this, plaintiffs attempt to equate the amended language of the statute with the former use of the word

"defined." But such a construction of the statute would render the additional and expanded change in wording superfluous, and it is an honored principle of statutory construction that statutes are to be given "such effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." *Rockbridge v. Lincoln,* 449 F.2d 567, 571 (9th Cir. 1971); *Richards v. United States,* 369 U.S. I, II, (1962).

Moreover, plaintiffs are straining to support their position through legislative history which this Court indicated in its prior opinion on several occasions (340 F. Supp. at 365, footnote 25, 366, 367) is essentially inconclusive. The wording of the statute itself is contrary to their position. As stated by the Supreme Court in *Gemsco v. Walling,* 324 U.S. 244, 260 (1945):

> "The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." Accord: *Ex Parte Collett,* 337 U.S. 55, 61 (1949).

B. The Relationship of the Secretary's Regulation, and therefore the Maryland Rule, to the Purposes and Provisions of section 407 of the Social Security Act.

In reaching this point, the next issue to be determined is whether the Secretary's new regulation, setting forth the standards by which AFDC-E applicants are to be determined as "unemployed," is consistent with the provisions of the statute at 42 U.S.C.A. §607.

The federal regulation provides two options for the states within the standards prescribed by the Secretary for determining the "unemployment" of an otherwise eligible applicant for AFDC-E. As the regulation states, "at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under a State's unemployment compensation law."

It seems apparent from this Court's previously quoted footnote 29 of its original decision and the Court's own construction of 42 U.S.C. 607, that this Court believes that with regard to the labor dispute issue a regulation such as that promulgated by the Secretary on July 12, 1973, is "in accordance with the discretionary authority conferred upon him (the Secretary) by, and within the confines of, 42 U.S.C. §607, as construed" by this Court. In its prior decision, this Court specifically stated that, "The Secretary could have authorized Maryland to exclude from AFDC-E benefits those out of work because of labor disputes." 340 F. Supp. at 638. The Court further stated that "in so doing this Court agrees that the Congress empowered the Secretary, by regulations, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those out of work because of involvement in labor disputes, or (3) to leave that decision to each State." Id. at 367. Thus, the Secretary has now provided the option suggested by the Court by amending his regulation to permit states to choose whether they want to include or exclude from AFDC-E those needy dependent children whose fathers are, in fact, unemployed because of participation in a labor dispute, an option clearly, in the view of this Court, authorized by the statute.

Based on this very same reasoning, it is clear that HEW also has the authority to prescribe standards in determining "unemployment" so as to permit states the option of including needy dependent children or excluding them from AFDC-E if their fathers are, more generally, disqualified from unemployment insurance. This the Secretary has also done in the new regulation.

Underlying the Court's conclusion is its recognition that HEW has wide latitude in prescribing standards for the definition of "unemployment" provided the standards are reasonable in light of the provisions and purposes of the Social Security Act. For, as this Court has recognized at 340 F. Supp. at 365, Congress has delegated broad rule-making powers to HEW in connection with administering the program. Likewise, this Court has recognized HEW's authority under the statute to grant discretion to the states. Id. at 365.

These principles were recently reaffirmed by the Supreme Court in the case of *New York State Department of Social Services v. Dublino*, ___ U.S. ___, 41 USLW 5047, 5052 (June 19, 1973), wherein that Court stated:

> "In interpreting this statute, [the Social Security Act] we must be mindful that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . .' Red Lion Broadcasting Co. v. FCC, 355 U.S. 367, 381 (1969); Dandridge v. Williams, *supra*, at 481-482."

In this case, such indications are wholly absent.

Giving states the option to impose such a restriction is truly compatible with the provisions of the Social Security Act relating to AFDC-E. Under section 407(b)(1)(B) of the Act, 42 U.S.C.A. 607(b)(1)(B), and 45 CFR 233.100(a)(3)(ii), the state plan must provide as an eligibility condition that the father has not without good cause, within 30 days prior to receipt of aid, refused a bona fide offer of employment or training for employment. The determination of what constitutes "good cause" and what constitutes a refusal of a bona fide offer of employment is largely left to the state, which, on the one hand, might reasonably determine that an individual disqualified for unemployment insurance because he is a striker is refusing his prior employment on a continuing basis without good cause, within the meaning of the statute. Similar reasoning would support exclusion from AFDC-F on the basis of other grounds of disqualification for unemployment insurance, depending on the specific basis for the disqualification and the timing in relation to the receipt of AFDC-E.

On the other hand, a state may elect to include such families where neither earnings nor unemployment benefits are available to meet the family's basic needs, without regard to the cause of disbarment from unemployment insurance benefits. Both schools of thought have their advocates and both are reasonable. Thus, leaving the choice to the states is a proper

exercise of the Secretary's discretion and clearly not susceptible of being characterized as wrong.

Moreover, there is another reason for providing this option. The Act also provides an absolute bar to AFDC-E benefits where the father qualifies for unemployment insurance, evidencing the congressional concern that public assistance not impair the integrity of the unemployment insurance program. Thus, section 407(b)(2)(C) of the Social Security Act, 42 U.S.C.A. 607(b)(2)(C), requires that a state plan preclude payment of AFDC-E with respect to any week for which the father receives state or federal unemployment insurance, even if the insurance benefits are inadequate to meet the family's need. This is the only circumstance specified in the public assistance titles of the Social Security Act in which receipt of benefits under a public benefits program results in complete ineligibility for public assistance, further emphasizing the congressional interest in the proper relationship between AFDC-E and unemployment insuramce. See *Burr v. Smith*, 322 F. Supp. 980 (W.D. Wash. 1971). Although the statute does not similarly require an absolute exclusion from AFDC-E because the father has been determined to be disqualified for unemployment compensation, a state may, when given such an option by the Secretary, reasonably conclude that payment of public assistance to a father who does not qualify for employment related income protection will undermine the purposes of the unemployment insurance law. In fact, this consideration appears to be the basis for Maryland's Rule 200.X.A.2, which attempts to avoid the anomaly of denying AFDC-E to those who receive unemployment insurance benefits while providing it to those who are disqualified for unemployment insurance because of their own acts. This Court has expressed some skepticism as to this so-called "anomaly," 340 F. Supp. at 365, footnote 24. However, based on the Court's recognition of the Secretary's authority to provide the states with options as to the definition of "unemployment," as well as the Secretary's broad rule-making authority, we believe that the fact that this exclusion is now specifically authorized by the Secretary's regulation should alleviate this Court's concern. The test is not whether this Court agrees with the state's choice, but whether the option granted by the Secretary's regulation is consistent with the statutory scheme and falls within the Secretary's authority. We believe that it is.

C. The Relationship of AFDC-E to Unemployment Compensation under the Statute.

Plaintiffs contend that, even if HEW has some authority to grant discretion to the states in defining the statutory word "unemployment," the Secretary is precluded by the statute from granting discretion in the area of the "relationship of AFDC-E to unemployment insurance" due to the fact that section 407(b) sets out the exclusive Congressional scheme as to this relationship. However, as this Court has already ruled that the statute does permit HEW to grant discretion to the states, this argument would have merit only if the statutory language or the legislative history clearly indicated that there is an exception to this general delegation of authority for this particular relationship. In other words, the statute itself or the legislative history must clearly show that Congress intended to, in the plaintiffs' words, "preempt" the field. Plaintiffs have not demonstrated such an exception.

On the contrary, the Maryland Rule, as now authorized by the Secretary, is consistent with the pattern established by the Congress under section 407 for the definition of "unemployment" and it is also consistent with other provisions of section 407, particularly the requirement for denial of AFDC-E to individuals receiving unemployment compensation benefits.

D. The Secretary's Failure to Define "Unemployment."

Plaintiffs argue that due to the fact that the HEW regulation fails to define "unemployment" according to the American College Dictionary, the Secretary's regulation "must be declared null and void and without legal effect." Yet, as we have already demonstrated, and as this Court has recognized, the statutory

language which we are discussing here established the AFDC-E program as a program which provides benefits to needy children whose father are unemployed as determined in accordance with standards prescribed by the Secretary. Thus, the statute itself clearly authorizes HEW to prescribe only the standards for the states in choosing a definition of unemployment and not necessarily to mandate any definition of unemployment itself. This Court recognized the weakness of this argument of the plaintiffs at 340 F. Supp. 366, footnote 28, wherein it stated:

> "Nor does the usage of the word 'employed' or similar words in other contexts compel any one meaning of the word 'unemployment' as used in 42 USC 607 or the word 'employed' as used in 45 CFR §233.100(a).

V. The *Townsend v. Swank* Line of Cases is Distinguishable from the Present Controversy.

In three major cases, the Supreme Court has ruled that states cannot exclude from public assistance coverage any person who has met the basic federal definition of eligibility for AFDC. See *Townsend v. Swank*, 404 U.S. 282 (1971); *Carleson v. Remillard*, 406 U.S. 598 (1972) and *King v. Smith*, 32 U.S. 309 (1968).

Plaintiffs rely heavily on these cases in their argument, yet all of these cases are clearly distinguishable from the present controversy. The Court's decision in each of those cases was founded upon the inconsistency of state eligibility requirements with federal ones specified in the Social Security Act. However, in the present case, the determination of "unemployment" status is clearly to be left to the states by the very terms of the statute determined in accordance with standards prescribed by the Secretary. In other words, the Act specifically contemplates state determinations of the definition of "unemployment" and such a determination, if in accord with federal standards, is not a collateral condition imposed by the state. Thus, the cases on collateral conditions of eligibility are not applicable here; the present suit deals not with

collateral factors, but with the qualifying definition itself. The question is not whether a family which is eligible under the express provisions of the Social Security Act may be disqualified because of an additional state-imposed condition; it is whether the statutorily imposed and state-implemented condition of unemployment is met.

Plaintiffs' improper reliance on the *Townsend v. Swank* line of cases has resulted in plaintiffs' use of the wrong test for determining the validity of the new HEW regulation. In those cases, the focus was on determining the validity of state eligibility conditions, and the Court held that that determination required specific "congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history." *King v. Smith*, 392 U.S., at 333, footnote 34. Here, however, we are dealing with the validity of the federal standard, and the test is whether that standard, as established by the Secretary's regulations, is consistent with the Social Security Act.

Finally, we would mention that, in any case, the Supreme Court has recently modified its rulings in the *Townsend* line of cases by its decision in *New York State Board of Social Services v. Dublino, supra.* As the Court stated therein with regard to the State of New York's so-called Work Rules, which required cooperation by employable individuals to continue to receive assistance:

> ". . . the Act allows for complementary state work incentive programs and procedures incident thereto — even if they became conditions for continued assistance. Such programs and procedures are not necessarily invalid, any more than other supplementary regulations promulgated within the legitimate sphere of state administration. See *Wyman v. James*, 400 U.S. 309 (1971); *Snell v. Wyman*, 281 F. Supp. 853, aff'd, 393 U.S. 323 (1969). See also *Dandridge v. Williams, supra; Jefferson Jefferson v. Hackney, supra.*"

Conclusion

For the foregoing reasons, the Secretary believes that the injunction against the Maryland Rule 200.X.A.2 should be dissolved.

GEORGE BEALL,
United States Attorney,
THOMAS G. BANJANIN,
Assistant U.S. Attorney.

Of Counsel:
STEPHANIE W. NAIDOFF,
Regional Attorney,
JAMES C. NEWMAN,
Assistant Regional Attorney,
Region III,
Office of the General Counsel,
Department of Health, Education,
and Welfare.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum Amicus Curiae of the Department of Health, Education, and Welfare were mailed postage prepaid to C. Christopher Brown, Esq., Legal Aid Bureau, Inc., 341 N. Calvert St., Baltimore, Md. 21202; Joel J. Rabin, Esq. and Diana G. Motz, Esq., Assistant Attorney's General, 1100 N. Eutaw St., Baltimore, Md. 21201; Lawrence M. Cohen, Esq., 111 W. Washington St., Chicago, Illinois 60602; and Rob Ross Hendrickson, Esq., Suite 900, 301 North Charles Street, Baltimore, Md. 21201; attorneys for defendants and other persons who have appeared herein, this 19 day of February, 1974.

GEORGE BEALL
United States Attorney
THOMAS G. BANJANIN
Assistant U.S. Attorney
405 U.S. Court House Bldg.
Baltimore, Md. 21202
Phone: 301/962-4822

In the United States District Court
For The District of Maryland

Civil No. 71-853-K.
June 25, 1974

Robert Francis, etc., et al.

v.

Rita C. Davidson, Secretary, Department of Employment and Social Services, et al.,

The Chamber of Commerce of the United States, Intervenor,

Department of Health, Education & Welfare, Amicus Curiae.

Action for injunctive relief against enforcement of state regulations in regard to AFDC benefits. The state moved to dissolve the injunction. A three-judge District Court, Frank A. Kaufman, J., held that Maryland AFDC-E regulation excluding from benefits children of fathers unemployed because of labor disputes was invalid.

Motion to dissolve injunction denied.

FRANK A. KAUFMAN, District Judge.

After this Court's first opinion in this case[1] was summarily affirmed by the Supreme Court of the United States,[2] the Secretary of the Department of Health, Education and Welfare (HEW) promulgated, effective July 12, 1973, an amendment to 45 C.F.R. § 223.100(a). Prior to that amendment, that regulation provided in part:

---

[1] 340 F. Supp. 351 (D. Md. 1972).

[2] 409 U.S. 904, 93 S. Ct. 223, 34 L. Ed. 2d 168 (1972).

If a State wishes to provide AFDC for children of unemployed fathers, the State plan * * * must [with exceptions not here relevant] * * *:

(1) Include a definition of an unemployed father

(i) Which shall include any father who is employed less than 30 hours a week, or less than three fourths of the number of hours considered by the industry to be full time for the job, whichever is less, and

(ii) Which may include any father who is employed less than 35 hours a week, or less than the number of hours considered by the industry to be full time for the job, whichever is less.

After the July 12, 1973 amendment, subsections (i) and (ii) of 45 C.F.R. § 23.100(a)(1) were amended to read as follows:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of the temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month;

except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.[3]

[3] Before adopting that amendment HEW published on January 3, 1973 the following notice in 38 Fed. Reg. 49:

Social and Rehabilitation Service

[45 CFR Part 233]

COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

Dependent Children of Unemployed Fathers

Notice is hereby given that the regulation set forth in tentative, alternative form below is proposed by the Administrator, Social and Rehabilitation Service, with the approval

Thereafter, the State of Maryland, citing the July 12, 1973 change in the federal regulation, moved to dissolve the injunction this Court issued in accordance with its

of the Secretary of Health, Education, and Welfare. Both alternatives would amend § 233.100(a) (1), which provides a Federal definition of unemployed father under the AFDC program in terms of hours of work.

In applying the existing regulation, the Department policy has been to permit a State, at its option, to use a definition of unemployed father which imposes additional conditions relating to the reason for the unemployment, e.g., the State definition might exclude a father whose unemployment, results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law. In Davidson v. Francis, the U.S. Supreme Court on October 16, summarily affirmed the judgment of the district court which held, in effect, that while the Secretary has broad authority to define an unemployed father for purposes of section 407 of the Social Security Act, the existing Federal regulation provides only an hours-of-work test, and thus prohibits a State from excluding fathers who meet this test but are disqualified for unemployment compensation.

Accordingly, the proposed alternative A below would amend the regulation to make the prior Department policy explicit, by stating the options which are permitted to the States in defining an unemployed father. Alternative B, on the other hand, would amend the regulation to make clear that the hours-of-work test is intended as the exclusive definition of unemployed father, so that States may not have definitions which impose added conditions. This would be a change in Department policy, but would be consistent with the way that the existing regulation has been interpreted by the courts.

Davidson v. Francis attracted broad interest from States, assistance recipients, and industry and labor groups. The regulations are proposed in alternative form to give all those who are interested full information as to the various courses of action which are being considered.

* * * * * *

ALTERNATIVE A

[Alternative A was adopted word-for-word on July 12, 1973 and is set forth *supra* in the body of this opinion.]

earlier opinion.[4] Plaintiffs noted their opposition to the State's motion. Subsequently, this Court granted the motion of the United States Chamber of Commerce to intervene,[5] requested and received the written views of the Secretary of HEW pursuant to Rosado v. Wyman, 397 U.S. 397, 406-407, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970), received briefs, and heard oral argument from the parties and the intervenor.[6]

ALTERNATIVE B

Section 233.100(a) (1) of Chapter II of Title 45 of the Code of Federal Regulations is revised to read as follows:

§ 233.100 Dependent children of unemployed fathers.

(a) *Requirements for State plans.* * * *

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20 and shall include any father who:

(i) Is employed less than 100 hours a month, or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hours standard for the 2 prior months and is expected to be under the standard during the next month.

This shall be the exclusive definition of an unemployed father.

* * * * * *

[FR Doc. 73-33 Filed 1-2-73; 8:45 am]

[4] In its January 28, 1972 opinion, this Court concluded (340 F. Supp. *supra* at 371) that injunctive relief was not required. Subsequently, at the request of the parties, in order to avoid ambiguity as to the status of this Court's holding and the appropriate appellate channel to be utilized in appealing therefrom, this Court granted injunctive relief on March 16, 1972.

[5] The intervenor urged the same result as did the State with regard to those out of work because of a labor dispute and took no position with regard to those out of work because of discharge for cause.

[6] While no constitutional question was raised by the State's motion to dissolve, this three-judge court determined not to dissolve itself and return the case to a single district judge, for the same reasons as are set forth in 340 F. Supp. *supra* at 364 n. 23.

Discharge for Cause

In its prior opinion[7] this Court held invalid Maryland's Rule 200.X.A.(2) which renders ineligible for AFDC-E aid children of "fathers who were discharged for gross misconduct or as a disciplinary measure", because that rule was in conflict with 45 C.F.R. § 233.100(a) as then written. In so doing this Court wrote:

> * * * A man out of work because he was discharged for cause by his employer *is unemployed.* There can be no two ways about that conclusion. * * * [Emphasis in original.]

[1, 2] The conflict between the federal and the Maryland regulation ended after the former was amended in July 1973 to permit each State to render ineligible for AFDC-E aid children whose fathers were unemployed by reason of their conduct. The federal regulation, as so amended, conflicts however with the provision for aid in 42 U.S.C. § 607(a) for "a needy child * * * who has been deprived of parental support or care by reason of the *unemployment* (as determined in accordance with standards prescribed by the Secretary) of his father * * *."[8] The statute relates to the unemployment of a father — and a father who is discharged for cause by his employer *is* unemployed. Because the federal regulation is incompatible with the federal statute, it follows that the Maryland regulation as of this date is based upon a provision authorized by an invalid federal regulation, and is thus itself invalid. Until the Congress amends the statute, no combination of federal and state regulations may provide that a father who is unemployed is not unemployed.

Labor Dispute

By way of contrast a person out of work because of a labor dispute does not necessarily fall within the definition of "unemployed". In 1968, the Congress

[7] 340 F. Supp. *supra* at 366.

[8] (Emphasis supplied.) The statute is set forth in full at 340 F. Supp. *supra* at 371-373, Appendix A, and has not since been amended by the Congress.

enacted an amendment to 42 U.S.C. § 607(b) providing for the Secretary rather than the State to define unemployment. Commenting upon that amendment in its prior opinion, this Court wrote that "* * * the Congress empowered the Secretary, by regulation, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those out of work because of involvement in labor disputes, or (3) to leave that decision to each state. * * * " *Id.* at 367. Further, in that earlier opinion[9] this Court concluded that the Secretary by regulation at that time required participating States to classify those out of work because of labor disputes as "unemployed" and held Maryland's contrary regulation invalid. As related *supra*, the Secretary subsequently amended the federal regulation. That amendment established no standards for the States to follow and simply permitted each State to do as it chose. Thus, the Secretary interpreted this Court's opinion as nullifying the 1968 amendment.

Candor requires this Court to state that the language used by this Court in its earlier opinion in describing the three alternatives available to the Secretary does — literally read — permit the amendment promulgated by the Secretary on July 12, 1973. That language could have, and from hindsight should have, included as part of alternative (3) and after the words "to leave that decision to each state" the additional words "in accordance with appropriate standards established by the Secretary". The need for the inclusion of those words is strongly supported by the legislative history of the 1968 statutory amendment which makes it clear that the Congress, in 1968, no longer was willing to allow each state to define the word "unemployment" for itself, but rather desired that national standards be established by the Secretary. "Section 607 was amended in 1968 to remove from the states the authority to define unemployment * * *." Macias v. Finch, 324 F. Supp. 1252, 1256 (N.D. Cal.), aff'd, 400 U.S. 913, 91 S. Ct. 180, 27 L. Ed. 2d 153 (1970). For example, the Under Secretary of HEW in 1967, Wilbur Cohen, stated to the Senate Finance Committee:

[9] 340 F. Supp. *supra* at 367-370.

> Today, 22 states have programs to assist such children. But the differences between State programs are great. States may define unemployment as narrowly or broadly as they wish, requiring substantial previous work experience or no work experience.
>
> * * * * * *
>
> * * * [F]or the first time the House Bill would set a Federal definition of unemployment. We are in complete agreement that there should be a Federal definition of unemployment.[10]

And the House Report,[11] with regard to the bill which embodied that amending language, explained:

> * * * Under present [1961] law, the States can establish programs for families with dependent children based on the unemployment of a parent and receive Federal matching. The definition of unemployment is left up to the individual States. Under the bill, Federal matching would be available only for the children of unemployed fathers and the definition of unemployment would be made by the Federal Government.

The Secretary, instead of being required to promulgate a national definition, was required by the 1972 amendment only to establish national standards within which the regulations of each of the states were to be channelized and confined. The July 12, 1973 federal regulation contains no standards whatsoever. Accordingly, that federal regulation does not carry out the intent of the 1968 amendment and is thus invalid. Accordingly also, the Maryland AFDC-E regulation excluding those unemployed because of labor disputes remains invalid.

It follows that the State's motion to dissolve this Court's outstanding injunction in this case must be, and it hereby is, denied.

[10] Parts of statement before the Senate Finance Committee on August 22, 1967, p. 268.

[11] H.R. Rep. No. 544, 90th Cong., 1st Sess. 17 (1967).

In The United States District Court
For the District of Maryland

Civil No. 73-874-H
Nov. 27, 1974

Barry Bethea, Individually and on behalf of his minor child, Barry Bethea, Jr., Plaintiffs,

v.

David T. Mason, Secretary, Maryland Department of Employment and Social Services, Defendant.

ALEXANDER HARVEY, II, District Judge:

In Francis v. Davidson, 340 F. Supp. 351 (D. Md.), aff'd 409 U.S. 904, 93 S. Ct. 223, 34 L. Ed. 2d 168 (1972) (hereinafter *Francis I*), a three-judge court in this District considered constitutional and other issues relating to the administration of the AFDC-E program by the State of Maryland.[1] The plaintiffs in *Francis I* were fathers who had been discharged from employment for misconduct or who had become unemployed because of a labor dispute. They there brought a class action seeking declaratory and injunctive relief and damages, alleging that benefits under the AFDC-E program had been denied to their children by the Maryland Department of Employment and Social

[1] AFDC-E is the commonly-used label for a program established by Congress in 1961 pursuant to Section 407 of the Social Security Act, 42 U.S.C. § 607, providing aid for the children of fathers who are unemployed. The program, which depends upon a combination of both federal and state funds, is administered by the various participating states pursuant to regulations of the Department of Health, Education and Welfare. The history of the AFDC-E program is discussed more fully in *Francis I, supra,* at 354, n. 1.

Services under its Rule 200.X.A.(2)[2] They alleged that the Rule violated (1) the Equal Protection Clause of the Fourteenth Amendment and (2) 42 U.S.C. § 607 and regulations of the Department of Health, Education and Welfare (hereinafter HEW).

In *Francis I,* Judge Kaufman, writing for a unanimous three-judge panel, found first that the Court had jurisdiction under 28 U.S.C. § 1343(3) because the equal protection claim asserted by the plaintiffs was not frivolous.[3] However, applying the test laid down in Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), the Court considered the plaintiffs' equal protection contentions on their merits and rejected them. Next, the Court concluded that although it had rejected the constitutional claim, it should "continue to assert its jurisdiction and proceed to resolve the issues herein involving federal statutes and federal regulations." 340 F. Supp. at 360. Finally, ruling on the pendent statutory claim, the Court in *Francis I* held that the State of Maryland could not under Rule 200.X.A.(2) deny AFDC-E benefits to children of fathers who were unemployed because they had been discharged for misconduct or because they had been involved in a labor dispute. The Court found that the

[2] Rule 200.X.A.(2) denies AFDC-E benefits to children of fathers who are "disqualified for unemployment insurance." The Rule provides, in part, as follows: "A grant may not be paid from GPA or AFDC-E: * * * (2) To meet need due to being disqualified for unemployment insurance." Maryland's Unemployment Insurance Law provides that an individual does not qualify for unemployment insurance benefits if he is discharged for "gross misconduct" or if it is determined that "his unemployment is due to a stoppage of work, other than a lockout, which exists because of a labor dispute * * *." Annotated Code of Maryland, Art. 95A, §§ 6(b) and 6(e) (1969 Repl. Vol.).

[3] The Court found it unnecessary to determine whether jurisdiction also existed under 28 U.S.C. § 1343(4) or § 1337. 340 F. Supp. at 360, n. 20.

Rule was in conflict with HEW regulations establishing mandatory standards of eligibility for benefits.[4]

After the Supreme Court summarily affirmed the *Francis I* opinion, the Secretary of HEW promulgated an amendment to the HEW regulations in question, permitting states to exclude from receiving AFDC-E benefits children of fathers who were unemployed because of participation in a labor dispute or because they were disqualified for unemployment compensation under state law.[5] The amended HEW regulation had the effect of resurrecting Rule 200.X.A.(2) which previously had been invalidated by the *Francis I* decision. Accordingly, the Attorney General of Maryland filed a motion in the *Francis I* case, seeking to dissolve the injunction which the Court had entered. The State contended that Rule 200.X.A.(2), to the extent that it denied benefits to children of fathers who were unemployed because of a misconduct discharge or participation in a labor dispute, was a valid exercise of Maryland's rule-making authority pursuant to the amended HEW regulation.

A further hearing was held, and in another opinion written by Judge Kaufman the Court held that the

[4] Judge Kaufman reasoned as follows: "Thus, HEW used mandatory language, i. e., that the state plan *must* include any father who is employed less than a given number of hours. There is nothing in the regulation which permits a state plan to deny benefits under the state's AFDC-E program, on the ground that the father of the needy child is unemployed because his discharge from employment was due to his own misconduct. Such a father is clearly not employed. Consequently, Maryland Rule 200.X.A.(2), insofar as it attempts to transplant, within the framework of Maryland's AFDC-E program, the disqualification requirements of sections 6(b) and/or (c) of the Maryland Unemployment Compensation law, is violative of HEW's regulation." 340 F. Supp. at 365. Employing like reasoning, the Court further found that the HEW regulations in question required a "similar holding with regard to Maryland's denial of AFDC-E benefits to those out of work because of labor disputes." 340 F. Supp. at 366.

[5] See amendment to 45 C.F.R. § 233.100(a) (1), effective July 12, 1973.

amended HEW regulation was invalid because of a conflict with 42 U.S.C. § 607 and that Rule 200.X.A.(2) was also invalid because it was based on such regulation. Francis v. Davidson, 379 F. Supp. 78 (D. Md. 1974) (hereinafter *Francis II*). In denying the motion to dissolve the injunction, the Court in *Francis II* reaffirmed its previous holding that the children of fathers who were discharged from employment because of misconduct or who were unemployed because of a labor dispute were entitled to receive AFDC-E benefits notwithstanding the fact that their fathers were not entitled to unemployment compensation under Maryland law.

[1] The present action was filed August 29, 1973. The plaintiffs in this suit have brought a class action[6] for declaratory and injunctive relief as well as money damages[7] under 42 U.S.C. § 1983, naming as defendant the Secretary of the Maryland Department of Employment and Social Services. In this case, plaintiffs challenge Rule 200.X.A.(2) insofar as it denies benefits to yet another class of children, namely the children of fathers who are not eligible for unemployment compensation under Maryland law because they have voluntarily quit their jobs.[8] As in *Francis I*, plaintiffs here assert both the constitutional claim that the Maryland Rule denies them equal protection of the laws under the

[6] Defendant has agreed that this case may properly proceed as a class action.

[7] Plaintiffs concede that they are not entitled to money damages from the individual defendant or from the State of Maryland. It is further conceded by plaintiffs that they are not entitled to AFDC-E benefits retroactively to the date of the filing of this action, should this Court rule in their favor. See Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

[8] A provision of Maryland's Unemployment Insurance Law which was not before the Court in *Francis I* and *Francis II* disqualifies an individual from unemployment insurance benefits if he is unemployed "due to his leaving work voluntarily without good cause." Annotated Code of Maryland, Art. 95A, § 6(a) (1969 Repl. Vol.)

Fourteenth Amendment and the statutory claim that the Rule is in conflict with 42 U.S.C. § 607.

[2] In the original complaint, plaintiffs sought the convening of a three-judge court. However, since this action was filed, the Supreme Court has decided Hagans v. Lavine, 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). Under that decision, it is clear (and the parties have so conceded) that a single district judge can decide whether a constitutional claim such as plaintiffs' here is of sufficient substance to support federal jurisdiction. 415 U.S. at 536, 94 S. Ct. 1372. If the single judge finds a constitutional claim such as this one to be insubstantial or frivolous, the case should be dismissed. But if the single judge finds such constitutional claim to be not insubstantial, he may go on to decide the pendent statutory claim without having to convene a three-judge court. 415 U.S. at 543-545, 94 S. Ct. 1372.

Plaintiffs have moved for summary judgment, claiming that there is no genuine issue as to any material fact and that as a matter of law, Maryland Rule 200.X.A.(2) is invalid as it applies to them. Defendant has filed an opposition to such motion and a separate motion to dismiss this action on the ground that this Court lacks jurisdiction because plaintiffs' equal protection claim does not present a "substantial" constitutional question which would support jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and because there is no other basis for federal jurisdiction here.

I.

[3] The first inquiry of the Court in this case is whether there is federal jurisdiction, and determination of this question depends on the sufficiency of plaintiffs' constitutional claim. Rule 200.X.A.(2) can withstand constitutional challenge if there is a rational basis for treating plaintiffs' class differently from others who receive these benefits under Maryland law. Dandridge v. Williams, *supra*. Plaintiffs contend that it is not a rational distinction for Maryland to deny them benefits while granting benefits to children of fathers who are

eligible for unemployment insurance but have exhausted those benefits, who are temporarily disabled, who are underemployed as defined by federal law, who are ineligible for unemployment compensation because they have been involved in a labor dispute, and who are similarly ineligible because they have been discharged for misconduct. In particular, plaintiffs argue that it is unreasonable for the State to make the payments required by *Francis I* and *Francis II* to those children whose fathers are in the last two categories mentioned above but deny benefits to the children of fathers who are unemployed because they voluntarily quit their jobs.

In reply, defendants contend that plaintiffs have not alleged a sufficiently substantial equal protection claim because a three-judge panel of this Court in *Francis I* previously rejected on the merits a similar challenge to the same Rule. It is further argued that this is a welfare case like Dandridge v. Williams, *supra*, and that the decision of the Supreme Court in that case demonstrates that plaintiffs' constitutional claim here is "obviously without merit."

Pertinent to the question of jurisdiction before the Court is the very recent decision of the Supreme Court in Hagans v. Lavine, *supra*. In that case, recipients of benefits under the AFDC program brought a class action for declaratory and injunctive relief challenging a New York welfare regulation under which the State recouped prior emergency rent payments from subsequent AFDC grants. As here, the plaintiffs asserted a constitutional claim under the equal protection clause and a pendent statutory claim based on an alleged conflict between state and federal law. The Supreme Court, in reversing the Second Circuit, held that plaintiffs had alleged a substantial equal protection claim sufficient to confer jurisdiction under 28 U.S.C. § 1343(3) because no prior controlling decision of the Court had dealt with that or any similar regulation, and because it was not "immediately obvious" from the face of the complaint that the recoupment regulation was so "patently rational as to require no meaningful consideration" by the district court. 415 U.S. at 540-541,

94 S. Ct. at 1381. In *Hagans*, the Supreme Court referred to Ex parte Poresky, 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152 (1933) as one of the principal decisions on the subject before the Court and quoted from pages 31-32 of that opinion, as follows (415 U.S. at 537, 94 S. Ct. at 1379):

> [i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented; * * * The question may be plainly unsubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

In *Hagans*, the Supreme Court further said (415 U.S. at 538-539, 94 S. Ct. at 1380):

> Here, §1343(3) and §1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter for threshold determination, turned on whether the question was too insubstantial for consideration.

Applying the *Hagans* rationale to plaintiffs' equal protection claim here, this Court in making the required threshold determination cannot say that this claim is too insubstantial for consideration. Of course, as defendant points out, a three-judge panel of this Court in *Francis I* considered on its merits and rejected an equal protection claim similar to the one here asserted. However, there are significant differences between the constitutional claim asserted in *Francis I* and the one pressed here. In *Francis I*, this Court was careful to note that the equal protection claim there went to the constitutionality of the applicatiom of Rule 200.X.A.(2) to only two classes of unemployed fathers, i.e., strikers and those guilty of misconduct. This Court said (340 F. Supp. at pages 364-365):

> The specific issue which accordingly is presented herein as whether gross misconduct and discharge or suspension as a disciplinary measure, or disqualification because of involvement in a labor dispute, can be made disqualifications in a state's AFDC-E program, without that state violating federal statutory and/or regulatory requirements.

Thus, this Court's decision as to the constitutional issue in *Francis I* was limited to consideration of the rationality of the application of Rule 200.X.A.(2) to strikers and those guilty of misconduct. Plaintiffs' present claim that there is no rational basis for Maryland's denial of benefits to children of fathers who have voluntarily quit work was not before nor considered by this Court in *Francis I.*

Plaintiffs' equal protection claim in this case is in a significantly different posture than the similar claim asserted by plaintiffs in *Francis I.* This Court has now held in *Francis II* that Rule 200.X.A.(2) is invalid because the HEW regulation upon which it is based is also invalid. Children of fathers who are out of work due to misconduct or a labor strike are now entitled to those benefits. Apparently, plaintiffs, who are unemployed because they quit their jobs, are the only group of such fathers whose children do not receive similar benefits. Their equal protection claim here is therefore much stronger now than it would have been at the time it was considered by this Court in *Francis I.* At that time, there were several different classes which were being denied benefits. Even then, this Court found that the constitutional claim asserted was not frivolous but was sufficient to support federal jurisdiction.

Accordingly, this Court concludes that plaintiffs' equal protection claim is not obviously without merit. It is not immediately obvious to this Court from the face of the complaint that the denial by Rule 200.X.A.(2) of AFDC-E benefits to children of fathers who have voluntarily quit work is so patently rational as to require no meaningful consideration.[9] See Hagans v. Lavine, *supra*, 415 U.S. at 539-541, 94 S. Ct. 1372.

[9] Defendant has not argued, in the alternative, under Ex parte Poresky, *supra*, that plaintiffs' equal protection claim

[4] This is not to say that plaintiffs will probably prevail on the merits were their constitutional claim to be presented to a three-judge court. Under *Hagans*, the only question before this single district judge is whether the complaint on its face asserts a constitutional claim which is sufficiently substantial to support federal jurisdiction, not whether the plaintiffs will ultimately prevail on the merits. Most of defendant's arguments are addressed to the merits themselves, an issue which is not properly before this single district judge. As the Supreme Court said in *Hagans, supra* (415 U.S. at 542, 543, 94 S. Ct. at 1381, 1382):

> This reasoning with respect to the rationality of the regulation and its propriety under the Equal Protection Clause may ultimately prove correct, but it is not immediately obvious from the decided cases or so "very plain" under the Equal Protection Clause.
>
> * * * * * *
>
> Nor can we say that petitioners' claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." Onedia Indian Nation v. County of Oneida, 414 U.S. 661, 666-667 [94 S. Ct. 772, 777, 39 L. Ed. 2d 73] (1974).

has been foreclosed because the Supreme Court's summary affirmance of *Francis I* represents controlling decision on the merits. It is doubtful that a *per curiam* opinion summarily affirming a decision of a three-judge court would amount to a decision of the Supreme Court foreclosing the subject and leaving no room for the inference that the questions sought to be raised can be the subject of controversy. See Goosby v. Osser, 409 U.S. 512, 93 S. Ct. 854, 35 L. Ed. 2d 36 (1973); Hagans v. Lavine, *supra*, 415 U. S. at 537-538, 94 S. Ct. 1372. In any event, the countervailing argument can be made that the Supreme Court's summary affirmance approved this Court's conclusion in *Francis I* that the constitutional claim was sufficiently substantial to establish federal jurisdiction. It would certainly be an anomalous result for this Court to now find no federal jurisdiction *because of the Francis I* decision when this Court in *Francis I* held that it had jurisdiction over an almost identical claim.

Nor does Dandridge v. Williams, *supra*, foreclose plaintiffs' constitutional claim here. Defendant contends that the Supreme Court's decision in *Dandridge* establishes a principle of constitutional law which defeats plaintiffs' equal protection claim here. It is asserted that the Court, in recognizing the wide latitude states have in the area of economic regulation and in promoting social welfare, required a high degree of judicial restraint in this area and placed a very substantial burden on plaintiffs who seek to strike down state welfare regulations on equal protection grounds. These arguments were fully answered by the Supreme Court in *Hagans*, when it said (414 U.S. at page 539, 94 S. Ct. at page 1380):

> But *Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still "be rationally based and free from invidious discrimination." *Id.*, 397 U.S. at 487 [90 S. Ct. at 1162].

Under the facts and circumstances of this case, plaintiffs have asserted a sufficient constitutional challenge to Rule 200.X.A.(2) for purposes of establishing federal jurisdiction. In making the threshold determination whether that challenge is sufficiently substantial, this Court does not address itself to the merits. The ultimate effect of *Dandridge* on the merits of the constitutional claim advanced here is not for this single district judge to decide.

II.

Having determined that he has jurisdiction, this single judge may now proceed to adjudicate plaintiffs' pendent statutory claim without convening a three-judge court. Plaintiffs allege that as applied to them, Rule 200.X.A.(2) is in conflict with 42 U.S.C. § 607. A similar question was decided by the Court in *Francis II*, and what this Court must now determine is whether the reasoning adopted by that three-judge court would

apply to children of fathers who have voluntarily quit work as well as to children of fathers unemployed because of a labor dispute or because of misconduct.

[5] Defendant contends first that *Francis II* was wrongly decided and should not be followed by another judge of this Court. The undersigned does not agree. The conclusions reached by the unanimous three-judge court in *Francis II* are soundly supported by the reasons set forth in that opinion. Nor should this Court decline to follow *Francis II* merely because that decision has been appealed to the Supreme Court. If the Supreme Court reverses *Francis II*, defendant should of course ask this Court to reconsider the decision rendered in this case.[10]

[6, 7] Defendant next argues that *Francis II* is not controlling here because the facts are different and because a different provision of Maryland's a unemployment law is involved. Admittedly, *Francis II* dealt with the application of Rule 200.X.A.(2) to children of fathers who were discharged because of misconduct or who were unemployed because of a labor dispute. But the finding in *Francis II* that the Maryland Rule conflicted with federal law as applied in those two situations, likewise is determinative here. Just as "a father who is discharged for cause by his employer *is* unemployed" (379 F. Supp. at 81), so a father who voluntarily quits his job is unemployed within the meaning of 42 U.S.C. §607(a). The federal statute provides benefits for a needy child who has been deprived of parental support or care by reason of the unemployment of the father. Until Congress amends the statute, "no combination of federal and state regulations may provide that a father who is unemployed is not unemployed." *Francis II, supra* at 81. Because the federal regulation relied upon by defendant is incompatible with the federal statute, the Maryland Rule itself is likewise invalid as applied to the children of fathers who voluntarily quit their jobs.

[10] Of course, an appeal in this case would present the issues raised herein to the United States Court of Appeals for the Fourth Circuit. Such an appeal would permit the Fourth Circuit to review the soundness of the *Francis II* decision.

III.

For these reasons, defendant's motion to dismiss is denied and plaintiffs' motion for summary judgment is granted. As the Court held in *Francis I*, plaintiffs and their class are here entitled only to appropriate prospective relief. Counsel should submit an Order prepared in accordance with the findings and conclusions contained herein.

JUDGMENT

In the United States District Court
For the District of Maryland

Civil Action No. 73-874-H
Barry Bethea, et al.,
Plaintiffs,
v.
David T. Mason,
Defendant.

Plaintiffs having moved this court to request the convening of a three-judge court, to grant them summary judgment and for class certification, and defendant having moved the court to dismiss the complaint in the case, and

Upon consideration of the above motions and their supporting and opposing memoranda and the memorandum amicus curiae filed on behalf of the United States Department of Health, Education, and Welfare, and

In accordance with the terms of the written opinion of this court filed in this case on November 27, 1974, it is hereby

ORDERED that plaintiffs' motions for class certification and summary judgment be and are hereby GRANTED, and plaintiffs' request for the convening of a three-judge court and defendant's motion to dismiss the complaint be and are hereby DENIED, and it is further

ORDERED that this action is certified as a class action brought by a class of plaintiffs consisting of all fathers and their children who have been or would be found ineligible by the Maryland Department of Employment and Social Services for public assistance benefits and services under Section 407 of the Social Security Act (relating to Aid to Families with Dependent Children and Employable Fathers) because the fathers have been found ineligible for unemployment insurance benefits due to having voluntarily quit their prior employment, and it is further

DECLARED that Maryland Department of Employment and SOCIAL Services Rule 200.X.A.(2) as applied to the above class is in conflict with the terms of Section 407 of the Social Security Act and therefore invalid, and it is further

ORDERED that, as of the date of this order, the defendant Secretary of the Maryland Department of Employment and Social Services, his successors in office, agents, employees, and all other persons in concert and participation with him pay benefits under Section 407 of the Social Security Act to all persons in the above class who would be eligible for these benefits but for the fact that they are ineligible to receive unemployment compensation due to having voluntarily quit their prior employment.

Dated in Baltimore, Maryland this 12th day of December 1974.

ALEXANDER HARVEY, II,
United States District Judge.

David T. Mason, etc., et al.,
Appellants.

v.

Robert Francis, etc., et al.
No. 74-326.

Appeal from the United States District Court for the District of Maryland.

Facts and opinion, Francis v. Davidson, D.C., 379 F. Supp. 78.

Dec. 9, 1974. Motion of appellee Francis for leave to proceed *in forma pauperis* granted. The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari before judgment, certiorari denied.

United States Court of Appeals
For the Fourth Circuit

No. 74-1991

Robert Francis, individually and on behalf of his minor children, Robert J. Francis, Mary P. Francis, Elizabeth S. Francis, Michael J. Francis, James J. Francis, and Veronica H. Francis, individually and on behalf of all other persons similarly situated; Edward Wright, individually and on behalf of his minor child, Edward Wright, Jr., individually and on behalf of all other persons similarly situated,

Appellees,

v.

The Chamber of Commerce of The United States of America,

Appellant.

No. 74-1992

Robert Francis, individually and on behalf of his minor children, Robert J. Francis, Mary P. Francis, Elizabeth S. Francis, Michael J. Francis, James J. Francis, and Veronica H. Francis, individually and on behalf of all other persons similarly situated; Edward Wright, individually and on behalf of his minor child, Edward Wright, Jr., individually and on behalf of all other persons similarly situated,

Appellees,

v.

David T. Mason, Secretary of the Department of Employment and Social Services,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Winter, Circuit Judge, Kaufman and Young, District Judges.

No. 75-1165

Barry Bethea, Individually and on behalf of his minor child, Barry Bethea, Jr., Individually and on behalf of all persons similarly situated,

Appellees,

v.

Richard A. Batterton, Secretary, Department of Employment and Social Services, Individually and in his official capacity,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

(Argued July 9, 1975 Decided Sept. 22, 1975)

Before CRAVEN, BUTZNER, and FIELD, Circuit Judges.

Theodore Losin, Assistant Attorney General of Maryland, (Francis B. Burch, Attorney General of Maryland, and Joel J. Rabin, Assistant Attorney General of Maryland, on brief) for Appellants in Nos. 74-1992 and 75-1165; Gerard C. Smetana, (Burt A. Braverman, William H. DuRoss, III; Borovsky, Smetana, Ehrlich and Kronenberg; Milton Smith, General Counsel, and Richard B. Berman, Labor Relations Counsel, United States Chamber of Commerce, on brief) for Appellant in No. 74-1991; C. Christopher Brown for Appellees.

PER CURIAM:

In *Francis v. Davidson,* 340 F. Supp. 351 (D. Md. 1972), *aff'd* 409 U.S. 904, a three-judge court held that a Maryland regulation denying aid for dependent children benefits to persons who were ineligible for Maryland unemployment compensation was invalid because of the supremacy clause. Maryland had undertaken to deny benefits to families in which the father was unemployed because of being fired for misconduct or because of participation in a labor dispute. The controlling HEW regulation defined "unemployed father" in terms of hours worked without reference to any reason or reasons for unemployment.

After that decision, HEW changed its regulation to suit the state, and provided that the hours of work standard "need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the state's unemployment compensation law." The Secretary's new regulation left it to the state whether or not to adopt a straight number of hours worked test or to exclude those who were out of work because of a strike or misconduct. Maryland opted for exclusion.

Nos. 74-1991 and 74-1992 present the question of whether the Congress authorized the Secretary to leave to the states the definition of unemployment or whether he must, instead, establish a national definition. We agree with the district court that the Secretary's regulation of July 12, 1973, authorizing Maryland to determine for itself whether to disqualify certain breadwinners is contrary to the authorizing legislation.

We reject the contention of the Chamber of Commerce that we should undertake to resolve what the Chamber considers to be an intolerable tension between Aid for Dependent Children (of parents involved in a labor dispute) and the National Labor Relations Act. We do not view the national labor policy and the national social policy as irreconcilable, but if they are so viewed, there is presented a policy question for the Congress that is not for us to decide.

For the reasons stated by Judge Kaufman for the three-judge court, we affirm the decision below that Maryland may not exclude from the benefits of AFDC those children whose fathers are out of work because of as strike or misconduct. We adopt the opinion of the district court as our own.[1] 379 F. Supp. 78 (D.

[1] Since we heard argument we have been advised by the assistant general counsel to the Secretary that HEW has now determined that it should issue national standards which the court below held were required by the statute. He also advises that the Secretary has accepted the decision below with respect to persons fired for misconduct and intends to withdraw from the states the option of excluding such fathers from the AFDC program. Counsel stresses that the Secretary's intention has not yet been implemented and that proposed regulations have not yet been adopted.

Md.), *appeal dismissed and cert. denied*, 419 U.S. 1042 (1974).[2]

In No. 75-1165 the question is whether Maryland may exclude children of fathers who quit work from the benefits of AFDC. We agree with Judge Harvey that such children are entitled to the benefits provided by the Congress, and we adopt his opinion as our own. 384 F. Supp. 1274 (D. Md. 1974).

The decisions below will be

Affirmed.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. A-468

Richard A. Batterton, Etc. et al.,
Petitioners,
v.
Robert Francis, Etc., et al.

Upon Consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 19, 1976

/s/ WARREN E. BURGER,
Chief Justice of the United States.

Dated this 20th day of November, 1975

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. A-508

Chamber of Commerce of the United States,
Petitioner,
v.
Robert Francis, et al.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitl d cause be, and the same is hereby, extended to and including February 19, 1976.

/s/ WARREN E. BURGER
Chief Justice of the United States.

Dated this 4th day of December, 1975.

United States Court of Appeals
Fourth Circuit

September 22, 1975

To: Theodore Losin, Esquire; Francis B. Burch, Esquire; Joel J. Rabin, Esquire; Diana G. Motz, Esquires; Gerald C. Smetana, Esquire; James P. Garland, Esquire; Milton A. Smith, Esquire; Richard B. Berman, Esquire; C. Christopher Brown, Esquire

CLERK'S MEMORANDUM

In compliance with Rule 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case no. 74-1991, 74-1992 was entered this date. A copy of the court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39(c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

WILLIAM K. SLATE, II
Clerk.

Encls.

ORDER

In the United States District Court
For the District of Maryland

Civil No. 71-853-K

Robert Francis, et al,
Plaintiffs,

v.

David T. Mason, et al,
Defendants.

Upon full consideration of the Motions to Intervene and supporting Memoranda filed on behalf of the *amicus curiae*, The Chamber of Commerce of The United States of America, pursuant to Rule 24(a) and (b), F.R.C.P. as well as the opposition filed on behalf of Plaintiff, this Court hereby grants the Chamber's

Motion to Intervene as a party in the above captioned proceedings.

/s/ [illegible]
United States District Judge
/s/ [illegible]
United States District Judge
/s/ [illegible]
United States District Judge

Dated this 31st day of January, 1974.

United States Court of Appeals
for the Fourth Circuit

Robert Francis, et al.,
Appellees,

v.

The Chamber of Commerce of the United States,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. (Three-judge court) Winter, Circuit Judge, Kaufman and Young, District Judges.

(Argued February 6, 1973) (Decided June 20, 1973.)

Before HAYNSWORTH, *Chief Judge*, and RUSSELL and WIDENER, *Circuit Judges*.

WIDENER, *Circuit Judge:*

The United States Chamber of Commerce appeals to this court after being denied leave to permissively intervene in litigation before a three-judge district court in *Francis v. Davison*, 340 F. Supp. 351 (D. Md. 1972), *summarily affirmed without opinion*, ___ U.S. ___ 93 S. Ct. 223 (1972). The Chamber argues that it should have been allowed to intervene as of right under FRCP 24(a), or alternatively, that the district court abused its discretion in denying it permissibe intervention under

FRCP 24(b). We find no merit in the contentions set forth by the Chamber and dismiss the appeal.

The original action was brought by the plaintiffs against state officials to have the state officials enjoined from enforcing a state regulation that prevented plaintiffs from receiving AFDC-E benefits.[1] They alleged that the Maryland procedure violated an HEW regulation, 45 CFR § 233, 100(a), and that it denied them equal protection under the Fourteenth Amendment. The District court rejected the equal protection argument. 340 F. Supp. 351, 363-364. The court held, however, that the Maryland procedure did violate the HEW regulations and, therefore, plaintiffs were entitled to AFDC-E benefits. 340 F. Supp. 351, 364-371.

The Chamber sought to participate in the above litigation as an intervenor or, alternatively, as *amicus curiae.* The Chamber sought to advance the argument that the Maryland precedure was valid because, by reason of the Supremacy Clause of the Constitution and the national labor policy, a state was obligated to deny AFDC-E benefits to strikers in order not to violate an employer's right to bargain collectively, free from state interference. The district court allowed the Chamber to file an *amicus* brief and to take part in oral argument,

[1] AFDC-E is a program providing aid for children in a family in which the father is unemployed. See 42 USC § 607. The program is administered by the States under regulations promulgated by the Department of Health, Education and Welfare (HEW). See 45 CFR § 233, et seq, especially 45 CFR § 233.100(a)(1). In the instant case, Francis was denied AFDC-E benefits under Rule 200 X.A. of the Social Services Administration, Department of Employment and Social Services, of the State of Maryland, because he did not qualify for unemployment insurance under Maryland law. He did not qualify for unemployment insurance because he was on strike. See Md. Ann. Code 95A, § 6(e), (1969 Repl. Vol.). Being qualified for unemployment insurance was a prerequisite to receiving AFDC-E benefits under Maryland Rule 200 X.A. For a more complete explanation of the background, see *Francis v. Davidson, supra.*

but it denied the Chamber's petition for permissive intervention under FRCP 24(b).[2]

We are of opinion that this court has jurisdiction to hear this appeal. 28 USC § 1253 allows a direct appeal to the United States Supreme Court only in cases where a properly convened three-judge district court has either granted or denied an injunction. Since the instant appeal is from a denial of a petition for intervention and not from the denial of an injunction, we believe this is the proper forum in which to contest the decision. See Mr. Justice Douglas' dissent in *Oregon State Elks Ass'n, v. Falkenstein,* ___ U.S. ___, 41 L.W. 3312 (No. 72-640, December ___, 1972); Cf. *Mitchell v. Donovan,* 398 U.S. 427, 90 S. Ct. 1763, 26 L.E.(2d) 378 (1970).

The Chamber's first contention is that the district court should have allowed it to intervene as a matter of right under FRCP 24(a).[3] However, it did not petition for leave to intervene under Rule 24(a) and never brought this matter to the attention of the district court. Under these circumstances, it may not now assert this contention for the first time in this court. *McGowan v. Gillenwater,* 429 F.(2d) 586 (4th Cir. 1970). Therefore, we reject this contention.

The Chamber's next argument is that since it met all the requirements of Rule 24(a), it was an abuse of discretion by the district court not to allow it to permissively intervene under Rule 24(b).[4] We believe this position to be without merit.

[2] *Francis v. Davidson, supra.* 340 F. Supp. 355 fn. 7.

[3] Rule 24. Intervention.
"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[4] Rule 24(b):
"(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when

While we acknowledge the rule that a denial of permissive intervention may be reversed only for an abuse of discretion by the district court,[5] we do not believe such abuse existed in this case. Assuming, without deciding, that the Chamber established independent jurisdictional grounds to support its defense[6]

a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order, administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

See *Wolpe v. Poretsky,* 144 F.(2d) 505, esp. 508 (D.C. Cir. 1944).

[5] See *Railroad Trainmen v. B&O Railroad,* 331 U.S. 519, 524 (1947); *Allen Co. v. Cash Register Co.,* 322 U.S. 137, 142, 64 S. Ct. 905, 88 L. Ed. 1188 (1944); *State of North Carolina v. Southern Ry. Co.,* 30 F.)2d) 204 (4th Cir. 1929), cert. den. 279 U.S. 858, 49 S. Ct. 352, 73 L. Ed. 999 (1929); *Martin v. Kalvar Corporation,* 411 F.(2d) 552 (5th Cir. 1969); 7A Wright & Miller, *Federal Practice and Procedure,* § 1923, pp. 630-632. But, see *Radford Iron Co. v. Appalachian Electric Co.,* 62 F.(2d) 940 (4th Cir. 1933), cert. den. 289 U.S. 748, 53 S. Ct. 691, 77 L. Ed. 1494 (1933).

[6] When a party seeks permissive intervention, as here, he must generally establish independent jurisdictional grounds to support his claim or defense. *Babcock & Wilcox Company v. Parsons Corporation,* 430 F.(2d) 531 (8th Cir. 1970) and cases cited therein; see *Beard-Laney, Inc. v. Pressley,* 18 FRD 162 (W.D. S.C. 1955). 7A Wright & Miller, *Federal Practice and Procedure,* § 1917. There are exceptions to this general rule, but it is doubtful that the Chamber comes within them. See *Wright & Miller,* supra, for an explanation of the exceptions to the rule.

and alleged a sufficient interest[7] in the transaction which was the subject of the litigation in the district court, we do not believe that it is so situated that the disposition of the matter will, as a practical matter, impair or impede its ability to protect its interest.[8]

The Chamber admits that if the decision of the district court is sustained, it will not be precluded from later pressing its interests in another suit. It contends that even though it is not bound by the decision it will be disadvantaged in any further suit which it might bring because the district court's ruling would influence the court in which the new suit would be brought. The Chamber also says that a new action will be difficult to initiate because the mootness doctrine enunciated by

[7] We question whether the Chamber sufficiently alleged a significantly protectable interest in the litigation in this case so as to come within the interest requirement of Rule 24(a). See *Donaldson v. United States,* 400 U.S. 517, 531, 91 S. Ct. 534, 27 L. Ed. (2d) 580 (1971). We also question the Chamber's standing to intervene as a part under *Sierra Club v. Morton,* 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. (2d) 636 (1972), since it failed to allege or show that any of its members were engaged in a strike with their employees and that some of these employees were eligible for AFDC-E benefits. However, since we believe that the Chamber fails to meet the practical impairment requirement of Rule 24(a), we do not reach the merits of the above issues.

[8] This is a requirement of Rule 24(a). Prior to the 1966 amendment of Rule 24, the rule was that a party could not intervene under 24(a) unless it might be bound by the judgment in the pending action. The term bound was interpreted to mean bound in the *res judicata* sense. The Rule now requires only that the "disposition of the action may as a practical matter impair or impede his (the applicant's) ability to protect that interest." This was designed to liberalize the right to intervene in federal actions. Thus, in a proper case, *stare decisis* by itself may furnish the practical disadvantage required under 24(a). See *Nuesse v. Camp,* 385 F.(2d) 694, 701 (D.C. Cir. 1967); 7A Wright & Miller, *Federal Practice and Procedure,* § 1908. However, we do not think that the present controversy is such a case. We especially note that there is no class of defendants of which the Chamber is a member.

the Third Circuit in *Super Tire Engineering Co. v. McCorkle,* 469 F.(2d) 911 (3rd Cir. 1972), would require an in-progress strike of sufficient duration to permit the completion of a trial and an appeal.

The answer to the above contentions is that the district court's ruling on the Chamber's *amicus* argument was, at most, mere *dicta* and not binding on anyone. The district court did not rule on the merits of the Chamber's contention; its only *holding* was that the Chamber would not be permitted to intervene. In view of the fact that the district court's discussion of the Chamber's position was *dicta*[9], we fail to see how it might be impaired or impeded in asserting its position in some future litigation. Cf. *Credits Commutation Co. v. United States,* 177 U.S. 311, 20 S. Ct. 636, 44 L. Ed. 782 (1900). Concerning the mootness issue, we express no view at this time as to the correctness of the decision in *Super Tire Engineering Co., supra.* Thus, the Chamber must only meet the requirement of Article III of the Constitution and present "a case or controversy" to the court in any future litigation. Since this is a burden that rests upon every party involved in litigation in a federal court,[10] we do not feel it too heavy. Accordingly, we believe that the Chamber failed to meet the practical impairment requirement of Rule 24(a). Its contention that the district court abused its discretion by denying permissive intervention because it met the requirements of Rule 24(a) must fail.

The Chamber's final argument is that, even if it did not meet the requirements of Rule 24(a), the district court abused its discretion by rejecting the Chamber's position and then denying it party status. It apparently argues that the district court ruled on the merits of its position. As we said above, the district court held only

[9] "The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case." *Railroad Trainmen v. B&O Railroad,* 331 U.S. 519, 524 (1947).

[10] See *North Carolina v. Rice,* 404 U.S. 244, 92 S. Ct. 402, 30 L. Ed. (2d) 413 (1971).

that the Chamber's position did not warrant permissive intervention. Cf. *Credits Commutation Co., supra.* Anything said there with regard to the Chamber's substantive position was *dicta.* The Chamber failed to demonstrate how its interest has been prejudiced or how the district court abused its discretion.

We are of opinion the statement by the Supreme Court in *Sutphen Estates v. United States,* 342 U.S. 19 (1941), should apply here:

> "Permissive intervention is governed by Rule 24(b). But we have said enough to show that the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene. The court had ample reason to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere." 342 U.S. 19, 23.

On the whole case, we are of opinion that the decision of the district court was not an abuse of its discretion under Rule 24(b). Accordingly, we dismiss the appeal.[11]

APPEAL DISMISSED

[11] See 7A Wright & Miller, *Federal Practice and Procedure,* § 1923, pp. 626-630.

PRE-HEARING MEMORANDUM FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

In the United States District Court
For the District of Maryland

Civil Action No. 71-853-K

Robert Francis, et al,
Defendants,
v.
David T. Mason, et al,
Defendants.

Pursuant to Local Rule 9, the Chamber will briefly outline the issues that, it submits, require this Court's consideration: (1) whether the Secretary of H.E.W. has established proper "standards" within which the states may disburse A.F.D.C. benefits; and (2) whether, wholly apart from the disputed standards, the State of Maryland is still free to deny benefits to striking employees pursuant to other provisions of the same statute requiring recipients to accept available work. By arguing only these points, the Chamber does not, of course, waive its arguments previously made to this Court, particularly in light of a recent decision of the Supreme Court in *Super Tire Engineering Co. v. McCorkle,* ___ U.S. ___, 42 L.W. 4507 (April 16, 1974), viz: that the federal collecting bargaining scheme precludes the payments to striking employees at issue here. The Chamber will limit its presentation to the validity of Maryland's policy denying benefits to striking employees, and takes no position with regard to any other issues.

1. As this Court has already recognized, Congress delegated the "policy making function" of setting

standards to H.E.W., and its judgment must be given "considerable weight." *Francis v. Davidson,* 340 F. Supp. at 365; *Udall v. Tallman,* 380 U.S. 1 (1965). Absent a demonstration by Plaintiff that there are "compelling indications" (*New York State Dept. of Soc. Ser. v. Dublino,* ___ U.S. ___, 93 S. Ct. 2507, 2517 (1973)) that the Agency "is wrong" (*Ibid*), or draws unreasonable distinctions between classes, its interpretation must be sustained. Here no such "compelling indications" exist and, as this Court held, distinctions drawn with respect to striking employees are reasonable. Plaintiff's authorities are distinguishable since in those cases "state law exclude[d] people from A.F.D.C.-E benefits whom the Act *expressly provided would be eligible." Ibid.* This Court has rejected Plaintiff's current contentions twice and should adhere to that position.

2. Even assuming *arguendo* that Plaintiff is correct that the Secretary's regulations are improper, Maryland is still free to deny benefits to striking employees. To qualify for benefits an applicant cannot refuse work except for good cause." 42 U.S.C. § 607(b)(1)(b). Maryland is free to conclude that a striker's refusal to accept work at his federally guaranteed job does not fall within the "good cause" exception. A state's power to deny such benefits to strikers is made clear by the floor debates during the passage of the present statute. *Reply of the Chamber of Commerce,* pp. 8-7. Indeed, one commentator has even asserted that the work requirement precludes a state from ever granting benefits because the "good cause" exception was never intended to include strikers. *See Welfare for Strikers: I.T.T. v. Minter,* 39 *U. Chi. L.R.* 79, 90 (1972). Accordingly, even if this Court finds that the H.E.W. regulation is invalid, this Court's injunction must be modified to permit Maryland to deny the disputed benefits to striking employees pursuant to the work requirements of the federal statute, if it so wishes.

CONCLUSION

For each of the above reasons, this Court is requested to modify its injunction to permit the State of Maryland to deny benefits to striking employees.

Respectfully submitted,

(CERTIFICATE OMITTED IN PRINTING)

MOTION FOR INTERVENTION ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

In the United States District Court
For the District of Maryland

Case No. 71-853-K

Robert Francis, et al,
Defendants,
v.
Rita C. Davidson, et al.,
Plaintiffs.

Pursuant to Rules 24(a) and (b) of the Federal Rules of Procedure, the Chamber of Commerce of the United States of America hereby moves to intervene in this case for the limited purpose of assuring that all interests will be adequately represented, should an appeal be taken by one of the present parties. In support of this motion, the Chamber states:

1. This Court previously enjoined the State of Maryland from refusing to grant certain federal welfare benefits to applicants who were unemployed due to their involvement in labor disputes. See *Francis v. Davidson,* 340 F. Supp. 351 (D.C. Md., 1972). The basis

for the Court's decision was that the Maryland eligibility rule conflicted with federal regulations governing the program. Because the federal regulations have since been amended to remove this conflict, Defendants have recently moved this Court to dissolve the previously issued injunction referred to, *supra.* The Chamber supports, adopts, and incorporates by reference that motion.

2. While Chamber does not intend to inject issues, it does seek to intervene at this stage of the proceedings for the limited purpose of protecting the unique economic stake of its membership in the event that one of the parties appeals this Court's decision on the pending motion. This Court has already recognized the interests of the Chamber by permitting it the status of an *amicus curiae* with full participatory rights. The question remains, however, whether the Chamber will be able to defend those same interests should either the State or the Plaintiffs appeal.[1] The Supreme Court has recognized that in the area of labor relations administrative agencies, such as defendants herein, are inadequate to protect simultaneously both private and public interests of aggrieved persons, such as the Chamber's membership. *Int'l Union, etc., Local 383 v. Scofield,* 382 U.S. 205, 217 n.7 (1965). See also, e.g., *Hodgson v. United Mine Workers of America,* 473 F.2d 118, 125 (1972); *Wolpe v. Poretsky,* 144 F.2d 505 (D.C. Cir. 1944); *Zuber v. Allen,* 387 F.2d 862 (D.C. Cir. 1967); *Smuck v. Hobson,* 408 F.2d 175 (D.C. Cir. 1969). In the past other courts have often recognized the benefit, if not necessity, of the Chamber's participation in order to protect the interests of employers generally and to insure a complete presentation of views which might

[1] Any "fear that . . . intervention would lead to a flood of intervenors . . . is . . . unfounded." Schapiro, *Some Thoughts On Intervention Before Agencies and Arbitrators,* 81 Harv. L. Rev. 721, 747 (1968). Naturally once the employers' interest represented by the Chamber is, in this Court's view, adequately represented, no other person can claim a "right" to intervene (See Rule 24(a), F.R.C.P.; *Textile Workers v. Allendale,* 226 F.2d at 768, n.10) or need be permitted to intervene. Rule 24(b), F.R.C.P.

not be presented by other parties. See, for example, *Grinnell Corp. v. Hackett, et al.*, 344 F. Supp. 749, rev'd 475 F.2d 499 (1st Cir. 1973); and *Russo v. Kirby*, 344 F. Supp, 122, *rev'd*, 453 F.2d 548 (2d Cir. 1971).

3. The stake of the Chamber's membership is clear. The Court's ruling on the pending motion to dissolve the injunction involved herein directly affects the relative collective bargaining strengths of management and unions. Accordingly, the result of this litigation will have a direct economic impact upon the Chamber's membership. See, *Dow Chemical Company and Chamber of Commerce v. Taylor*, ___ F. Supp. ___, 81 LRRM 2872 (E.D. Mich. 1972), and *Textile Workers v. Allendale*, 2226 F.2d 765 (D.C. Cir. 1955). The Chamber does not seek, however, to inject issues not now before the Court, but only to protect its membership's economic stake in these post-judgment proceedings, should an appeal be taken. See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) where the effect of economic competition was recognized as allowing intervention in post-judgment proceedings.

4. In light of the limited purpose of the Chamber's motion, i.e., to defend an appeal, no prejudice to the parties can result, and intervention should be permitted "as a matter of course." *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944). Indeed, alternatively an order conditioning the Chamber's intervention upon the filing of a notice of appeal by one of the other parties would be acceptable. Accordingly there could not exist any countervailing factors to preclude granting the instant motion.

WHEREFORE, The Chamber of Commerce of the United States of America respectfully urges that its motion for leave to intervene in this proceeding be granted.

Respectfully submitted,

(CERTIFICATE OMITTED IN PRINTING)

TRANSCRIPT OF PROCEEDINGS

In the United States District Court
For the District of Maryland

No. 71-853-K Civil

Robert Francis, et al.
v.
Rita C. Davidson, et al.

April 26, 1974

ROSE M. ELGIN
OFFICIAL REPORTER
327 U.S. Courthouse
111 N. Calvert Street
Baltimore, Maryland 21202
752-0717

* * * * * *

[57] in the background of every incipient labor contract.

JUDGE KAUFMAN: And where does that take you? In your memorandum, you have indicated that the McCorkle case buttresses the position you have taken.

MR. GOLDMAN: Right. All I'm really saying is this Court relied on the Minter decision and quoted from it. The part that this Court quoted stated there were two grounds for pre-emption. To simplify it, one was essentially where you have an area blocked and fully occupied, which is in effect the German type of supremacy.

Then you have a second. They refer to palpable infringement.

The obstacle that plaintiffs in cases like these are faced with, under the Minter and then the Grinnell decision, was the First Circuit attempted to require us to prove as a matter of fact, putting on strikers, putting on witnesses, that there was an effect. They wouldn't assume that the payment of money affects the course of human conduct, an assumption which underlies most various other aspects of law, such as criminal fines.

In Granite State, the Supreme Court recognized that if you fine an individual — it precluded the union from fining a striker crossing the picket line.

Payment of money to an individual affects human conduct. The Supreme Court finally has come out and said [58] there is no question about the effect, so what I argue now, or what I would argue if you should ever reach that point — and I would think it would require additional briefing, since the parties have not addressed the question — is that if the effect is now recognized, we now must face the question of whether it is a specific frustration of federal labor policy.

In Dublino, the Court refused to find pre-emption of the New York State work rules on a fully occupied theory but it remanded to the District Court on the question of specific conflicts.

What I'm saying here is the Super Tire case recognizes the fact that there could be a specific conflict here by eliminating the tremendous burden the First Circuit has put on us about having to prove as a matter of fact with witnesses and experts that there is an effect at all.

Now the Court must decide, if there is an effect, how that fits within that national labor policy. I won't go into that at any greater length. The Court, of course, will never reach that point if you decide in favor of the State of Maryland on either of the first two grounds, but if the Court does choose to rule adversely, I would think that this third ground should require additional briefing, since it hasn't been discussed by the parties in full briefs and the Super Tire decision is so recent.

JUDGE WINTER: All right, Mr. Goldman, do you have
* * *

* * * * * *

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICE
(45 CFR Part 233)

COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

AFDC—Definition of Unemployed Fathers

Notice of Proposed Rule Making

Notice is hereby given that the regulation set forth in tentative form below is proposed by the Acting Administrator of the Social and Rehabilitation Service with the approval of the Secretary of Health, Education, and Welfare. The purpose of the proposed regulation is to amend 45 CFR Section 233.100(a)(1) in two respects. First, the amended regulation withdraws from the States the option of excluding fathers who are unemployed because of conduct or circumstances which result or would result in disqualification for unemployment compensation. Such fathers must now be included. Second, the amended regulation requires that the State plan definition of "unemployed father" exclude those fathers whose unemployment results from participation in a labor dispute of such a nature that the father is not eligible for unemployment compensation under the State's unemployment compensation law.

The proposed regulation furnishes the States with a Federal standard for determining whether to include or exclude from ADFC-UF fathers who are unemployed as a result of participation in a labor dispute. The basis of this regulation is the statutory language of Section 407 of the Social Security Act, 42 U.S.C. Section 607, and the opinion of the United States District Court in the case of *Francis v. Davidson,* 379 F. Supp. 78 (D. Md., 1974), which is now on appeal to the United States Court of Appeals for the Fourth Circuit. The District Court held that under Section 407 of the Social Security Act, 42 U.S.C. Section 607, the Department had the

option of requiring States to include or exclude those out of work because of involvement in labor disputes, or to leave that decision to each State in accordance with appropriate standards established by the Secretary. The Court also held that those who had been discharged for cause were nevertheless unemployed and could not, under the statutory requirements, be considered otherwise. The court decision indicates that the Department should change the existing regulation and, by tying the eligibility for AFDC-UF of a father not working as the result of participation in a labor dispute to that father's eligibility for State unemployment compensation benefits, we will define the standards which the district court stated were required by statute. The Department intends to make the regulation effective on the date of its publication in final form.

Prior to the adoption of the proposed amended regulation, consideration will be given to any comments, suggestions or objections thereto which are received in writing by the Acting Administrator, Social and Rehabilitation Service, Department of Health, Education, and Welfare, P.O. Box 2372, Washington, D.C. 20013 on or before August , 1975. Comments will be available for public inspection in room 5225 of the Department's offices at 330 C Street, S.W., Washington, D.C. beginning approximately two weeks after date of publication, on Monday thru Friday of each week from 8:30 a.m. to 5:00 p.m. (area code 202/245/0950).

(Section 1102, 49 Stat. 647 (42 U.S.C. Section 1302)

(Catalog of Federal Domestic Assistance Program 13/761, Public Assistance-Maintenance Assistance (State Aid))

It is hereby certified that the economic and inflationary impacts of this regulation have been carefully evaluated in accordance with OMB Circular A-107.

Dated: July 25, 1975.

/s/ JOHN A. SVAHN
John A. Svahn
Acting Administrator, Social and Rehabilitation Service

Approved: August 4, 1975.

/s/ CASPAR W. WEINBERGER
Caspar W. Weinberger
Secretary

Section 223.100(a) of Part 233 of title 45 Code of Federal Regulations is amended by revising paragraph (a) to read as follows:

§ 233.00 Dependent Children of unemployed fathers:

(a) Requirements for State Plans. If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV — Part A of the Social Security Act must, except as specified in paragraph (b) of this section:

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20 of this chapter. Such definition must include any father who:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month;

except that such definition shall not include a father whose unemployment results from involvement in a labor dispute when the nature of that involvement is such that such father would, if otherwise eligible, be

disqualified for unemployment compensation under the State's unemployment compensation law.

* * * * * *

Title 45—Public Welfare

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

Dependent Children of Unemployed Fathers

Notice of proposed regulations regarding the definition of unemployed father in the program of Aid to Families with Dependent Children was published in the FEDERAL REGISTER of January 3, 1973 (38 FR 49). The notice presented two alternatives relating to the inclusion of fathers who are on strike or otherwise disqualified for unemployment compensation:

A: Give States option as to including or excluding;

B: Establish hours of work as the sole criterion, thus precluding exclusion of strikers otherwise eligible.

Thousands of comments were received, coming from all States. As could be expected, most of the responses were from management and labor; there were also many from private citizens and a number from Congressmen.

It is apparent from these comments that no one solution is going to satisfy all those who wrote. There was a fully predictable, although relatively close, division.

After consideration of the conflicting views presented, the Department has adopted alternative "A", leaving the States free to determine whether or not those on strike qualify for AFDC-UF. This is the only course fully consistent with the "New Federalism" policies of this Administration. This permits States wide flexibility in the administration of Federal/State programs, so that they may determine the best course of action in the light of their individual situations and varying circumstances. A Federal mandate either to include or exclude

strikers would be undue interference with States' decisions on the extent of the program. If such a mandate is desired it should be set by Congress through the customary legislative process. Accordingly, alternative "A" is considered the acceptable alternative and is reflected in the amended regulation.

Section 233.100(a)(1), Chapter II, Title 45 of the Code of Federal Regulations is revised to read as follows.

§ 233.100. Dependent children of unemployed fathers.

(a) *Requirements for State plans.* * * *

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20 of this chapter. Such definition must include any father who:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month; except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

* * * * * *

(Sec. 1102, 49 Stat. 647 (42 U.S.C. 1302))

Effective date. The regulations in this section shall be effective on July 12, 1973.

Dated: July 6, 1973.

JAMES S. DWIGHT, JR.,
Administrator, Social and Rehabilitation Service.

Approved: July 9, 1973.

CASPAR W. WEINBERGER,
Secretary.

[FR Doc. 73-14304 Filed 7-11-73; 8:45 am]

* * * * * *

Statutory Appendix

PART A.—AID TO FAMILIES WITH DEPENDENT CHILDREN

* * * * * *

§ 601. Appropriations.

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children. * * *

§ 602 State plans for aid and services to needy families with children; contents; approval by Secretary.

* * * * * *

(F) that if and for so long as any child, relative, or individual (referred to the Secretary of Labor pursuant to subparagraph (A)(i) and (ii) and section 607(b)(2) of this title) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

* * * * * *

§ 607. Dependent children of unemployed fathers; definition.

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title.

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C)(i) such father has 6 or more quarters of work (as defined in subsection (d)(1) of this section) in any 13-calendar-quarter period ending one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a)(19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

* * * * * *

§ 1302. Rules and regulations.

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter. (Aug. 14, 1935, ch. 531, title XI, § 1102, 49 Stat. 647; 1946 Reorg. Plan No. 2, §§ 1, 4, eff. July 16, 1946, 11

F. R. 7873, 60 Stat. 1095; 1949 Reorg. Plan No. 11, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271; Aug. 28, 1950, ch. 809, title IV, § 403(c), 64 Stat. 559; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631.)

* * * * * *

§ 354. Disqualifying conditions.

* * * * * *

(a-2) *Day of unemployment.*

* * * * * *

(iii) subject to the provisions of subsection (b) of this section, any day with respect to which the Board finds that his unemployment was due to a stoppage of work because of a strike in the establishment, premises, or enterprise at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which he was a member.

(b) *Participation, interest, or financial assistance in labor dispute.*

The disqualification provided in subsection (a-2) (iii) of this section shall not apply if the Board finds that—

(i) the employee is not participating in or financing or directly interested in the strike which causes the stoppage of work: *Provided,* That payment of regular union dues shall not be construed to constitute financing a strike or direct interest in a strike within the meaning of this and the following paragraphs; and

(ii) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed in the establishment, premises, or enterprise at which the stoppage occurs, * * *

* * * * * *

§ 141. Short title; Congressional declaration of purpose and policy.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. (June 23, 1947, ch. 120, § 1, 61 Stat. 136.)

* * * * * *

§ 151. Findings and declaration of policy.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed

goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective

bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (July 5, 1935, ch. 372, § 1, 49 Stat. 449; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 136.)

* * * * * *

§ 152. Definitions.

* * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * * *

§ 2014. Eligibility Standards.

* * * * * *

(c) *Employment of able-bodied adults; excepted persons; refusal of work during strike or lockout; definition.*

Notwithstanding any other provisions of law, the Secretary shall include in the uniform national standards of eligibility to be prescribed under subsection (b) of this section a provision that each State agency shall

provide that a household shall not be eligible for assistance under this chapter if it includes an able-bodied adult person between the ages of eighteen and sixty-five (except mothers or other members of the household who have the responsibility of care of dependent children or of incapacitated adults, bona fide students in any accredited school or training program, or persons employed and working at least 30 hours per week) who either (a) fails to register for employment at a State or Federal employment office or, when impractical, at such other appropriate State or Federal office designated by the Secretary, or (b) has refused to accept employment or public work at not less than (i) the applicable State minimum wage, (ii) the applicable Federal minimum wage, (iii) the applicable wage established by a valid regulation of the Federal Government authorized by existing law to establish such regulations, or (iv) $1.30 per hour if there is no applicable wage as described in (i), (ii), or (iii) above. Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment. For the purposes of this section, the term "ablebodied adult person" shall not include any narcotics addict or alcoholic who regularly participates, as a resident or nonresident, in any drug addiction or alcoholic treatment and rehabilitation program.

* * * * * *